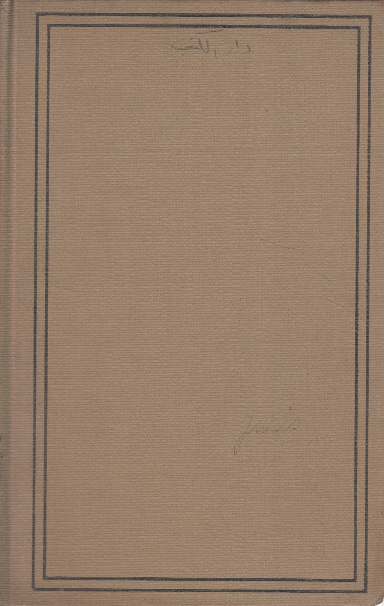

دار الكتب

CASES DECIDED

IN

THE COURT OF CLAIMS

OF

THE UNITED STATES

APRIL 18, 1939, TO DECEMBER 3, 1939

WITH

ABSTRACTS OF
DECISIONS OF THE SUPREME COURT
IN COURT OF CLAIMS CASES

AND

INDEX OF COURT OF CLAIMS CASES
VOLUMES 1 TO 89, INCLUSIVE

REPORTED BY

JAMES A. HOYT

VOLUME LXXXIX

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Judges

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BENJAMIN H. LITTLETON
THOMAS S. WILLIAMS
SAM E. WHITAKER [2]

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Secretary

WALTER H. MOLING

Chief Clerk

WILLARD L. HART

Assistant Clerk

JOHN W. TAYLOR [4]

Bailiff

JERRY J. MARCOTTE

---

[1] Appointed June 23, 1939, to succeed Chief Justice Fenton W. Booth, who retired, effective June 15, 1939. Chief Justice Whaley took the oath of office and assumed the duties thereof June 28, 1939.

[2] Appointed June 23, 1939, to fill the vacancy caused by the elevation of Judge Richard S. Whaley. Judge Whitaker took the oath of office and entered upon the duties thereof July 27, 1939.

[3] Appointed July 1, 1939. Mr. Gyles took the oath of office and entered upon his duties the same day.

[4] Appointed October 3, 1939, to succeed Fred C. Kleinschmidt, deceased. Mr. Taylor took the oath of office and entered upon his duties the same day.

ASSISTANT ATTORNEYS GENERAL

(Charged with the defense of the Government)

SAM E. WHITAKER
(Resigned July 27, 1939)

JAMES W. MORRIS
(Resigned June 25, 1939)

CARL McFARLAND
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FRANCIS M. SHEA
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ORDER OF THE COURT RELATING TO THE RETIREMENT OF CHIEF JUSTICE FENTON W. BOOTH

NOVEMBER 6, 1939.

The year 1939 was marked by an event which, in the opinion of the Court, deserves to be recorded more extensively than by a mere formal entry of the retirement of a Judge.

Fenton W. Booth was appointed a Judge of this Court on March 17, 1905, became Chief Justice on April 23, 1928, and retired on June 15, 1939. In his long service of almost 35 years, he endeared himself to both bench and bar. His affable and courteous management of the proceedings in open court commended him to the lawyers that practiced before it, and his fairness and conciliatory methods of conducting conferences of the Judges made these consultations harmonious and enjoyable. His extended experience made him an authority on the pleading and practice of the Court, and his decisions were always characterized by a desire to effectuate justice and a disregard of mere technicalities. In Indian cases involving facts, treaties, and Supreme Court decisions, over periods often extending back more than a century, his opinions so completely recite the essential features upon which a judgment must depend that they furnish a foundation for nearly all the cases of that nature which can arise.

As a testimonial of the regard of his associates and the value of his service to the public, it is directed that this entry be spread upon the records of the Court and a copy thereof be mailed to the retired Chief Justice.

ORDER OF THE COURT RELATING TO THE DEATH OF CHIEF JUSTICE EDWARD K. CAMPBELL, RETIRED

NOVEMBER 6, 1939.

Chief Justice Campbell, retired, died in the city of Washington on December 7, 1938, at the age of 80 years.

Edward Kernan Campbell, of Birmingham, Alabama, was appointed in May 1913, by President Wilson as Chief Justice of the Court of Claims. He retired in April 1928.

As was said by the Court upon the occasion of his retirement, during his service of 15 years Chief Justice Campbell gave to this Court a degree of industry and devotion which has never been excelled. Through his daily persistence and tireless energy the docket of the Court was brought to the enviable point whereby litigation in the Court was expeditiously disposed of and long and tedious delays eliminated, through reforms in procedure inaugurated at his suggestion. To the subject of the prompt dispatch of the Court's business he gave most intelligent and effective consideration. In addition to the great volume of executive duties which he was called on to perform, vastly increased by the litigation arising out of the World War, Chief Justice Campbell accomplished, at the expense of late hours and exacting labor, his full portion of the Court's opinions. He left a distinguished record for ability and fairness.

ORDER OF THE COURT RELATING TO THE DEATH OF FRED C. KLEINSCHMIDT

OCTOBER 2, 1939.

The Court announces with profound sorrow and sincere regret the death on last Wednesday, September 27, 1939, of Fred C. Kleinschmidt, who had served this Court with rare efficiency and fidelity for nearly half a century.

His sudden passing was a great personal shock to all the members of the Court, and his official associates, as it must have been to the members of the Bar. No one connected with the Court has ever been more generally liked for his uniform courtesy, nor more admired for his high character.

If Mr. Kleinschmidt had lived until today, he would have completed 48 years of loyal service with the Court of Claims. He entered the employ of the Court on October 1, 1891, in a minor position, a high school graduate, and he never had to seek, nor did he desire, any other employment. He was devoted to the Court, its traditions and its history.

On December 1, 1916, he was appointed assistant clerk of the Court, and held that position until his death.

As a tribute to his memory the Court will enter an order that this announcement, with a brief sketch of his career, be spread upon its records and the reporter of the Court is directed to include them in the next volume of reports. It is so ordered.

Fred C. Kleinschmidt was born in Georgetown, D. C., July 10, 1872, and lived in that section all his life. He attended graded schools in Washington and graduated from Central High School in 1890, the youngest member of his class. He was a member of the Central High's famous drill team. Mr. Kleinschmidt was the son of Dr. Carl H. A. Kleinschmidt, eminent surgeon, who for years was

instructor in the Georgetown Medical School, and also a surgeon in the Confederate Army.

Mr. Kleinschmidt was appointed a messenger in the Court of Claims on October 1, 1891, and assistant clerk December 1, 1916.

He was very active in amateur athletics in Washington, especially in baseball, and at one time was voted the outstanding amateur ball player in the District of Columbia. He was offered a position with the Washington professional team, but declined.

He leaves a brother and sister surviving him.

LEGISLATION RELATING TO THE COURT OF CLAIMS

[PRIVATE—No. 230—76TH CONGRESS]
[CHAPTER 653—1ST SESSION]
[H. R. 3172]

AN ACT

To confer jurisdiction on the Court of Claims to hear, determine, and render judgment upon the claim of Fiske Warren.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction is hereby conferred upon the Court of Claims to hear, determine, and render judgment upon the claim of the estate of Fiske Warren, Harvard, Massachusetts, for damages alleged to have been sustained by him as a result of the leasing of his property, situated in the town of Harvard, Massachusetts, to the United States Army, under contract numbered W218qm–562, dated June 30, 1933.

SEC. 2. Such claim may be instituted at any time within two years after the passage of this Act, notwithstanding the lapse of time or any statute of limitations. Proceedings in any suit before the Court of Claims under this Act, and appeals therefrom, and payment of any judgment thereon, shall be had as in the case of claims over which such court has jurisdiction under the Judicial Code.

Approved, August 10, 1939.

CASES DECIDED
IN
THE COURT OF CLAIMS

April 18, 1939, to December 3, 1939.

CAPE ROMAIN LAND AND IMPROVEMENT COMPANY *v.* THE UNITED STATES

[No. 42668. Decided May 1, 1939]

On the Proofs

Title to land; approval by Attorney General.—Where plaintiff sues to recover a balance claimed to be due "under an agreement for the lease of and an option to purchase lands under the provisions of the Migratory Bird Conservation Act," which act provides that no payment shall be made for land "until the title thereto shall be satisfactory to the Attorney General," a similar provision being contained in the lease-purchase agreement, it is held that there can be no recovery where the findings show there was no such approval by the Attorney General.

The Reporter's statement of the case:

Mr. A. L. Hamer for the plaintiff.

Mr. Edward A. Compton, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant.

The court made special findings of fact as follows:

On June 9, 1930, the United States entered into what is styled in the heading an "agreement for the lease of and an option to purchase lands under the provisions of the Migratory-Bird Conservation Act (45 Stat. 1222)" with the Cape Romain Land and Improvement Company, the lessors and

plaintiff herein. This agreement for lease and option of purchase was offered in evidence as plaintiff's exhibit No. 1 and is made part hereof by reference. It provided for the lease of certain lands described therein and for the conveyance to the United States of the land so described upon the terms and conditions set out in the agreement and granted an option to purchase the same. The price was fixed at 75 cents an acre, the "lessors" agreeing that the title to the land is clear, free, and unencumbered. It was further agreed that a survey should be made of the land; also that upon the execution and delivery of the deed for the same and "after the Attorney General of the United States shall have approved the title thus vested in the United States, he will cause to be paid to the lessors the purchase price by a United States Treasury warrant or disbursing officer's check." There was a further provision that if the lessors can not convey a title to any portion of said land which is satisfactory to the Attorney General of the United States, condemnation proceedings might be instituted; and it was also provided that "the Secretary [of Agriculture] will obtain an abstract of the title to the property hereinbefore described without cost to the lessors." Such an abstract of title was made in accordance with this provision.

The claim of the plaintiff is that the descriptions in the lease-purchase agreement represent a total of approximately 32,000 acres. The abstract of title shows a shortage of 10,221.44 acres. This shortage was due in part to overlapping and in part to erroneous acreage in the original survey grants. On November 18, 1931, the United States acquired by purchase under the lease-purchase agreement 17,376 acres and on June 6, 1932, also acquired under the lease-purchase agreement 4,657 acres, or a total of 22,033 acres, for all of which the Government has paid plaintiff both the rental and purchase price required by the terms of the lease-purchase agreement.

Besides the land for which the Government paid as above stated, the plaintiff seeks to recover for five other tracts comprising about 8,000 acres. With reference to three of these tracts referred to in the evidence as tract 2, tract 2C,

and tract 2D, the Government claims jurisdiction but not the fee, under an act of the South Carolina Legislature. There is no satisfactory evidence that these tracts were described in the lease-purchase agreement. The parties dispute as to whether another parcel, referred to in the evidence as tract 4a–1, was included in the lease-purchase agreement, but the evidence fails to show that the defendant ever acquired title thereto. In addition to the parcels above stated there is another for which plaintiff claims to be entitled to recover which is sometimes referred to as "Tract," and otherwise known as the Northrop land or tract. The Attorney General refused to recommend the purchase of this tract.

The evidence fails to show that the title to any of the tracts for which plaintiff now claims recovery, or any part thereof, was satisfactory to the Attorney General, and also fails to show that he approved the title to said tracts or any part thereof.

The court decided that the plaintiff was not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

This is a suit begun by the plaintiff to recover a balance claimed to be due under an "agreement for the lease of and an option to purchase lands under the provisions of the Migratory-Bird Conservation Act (45 Stat. 1222)" entered into between the plaintiff and the defendant. The material facts are briefly set out in the findings. The controversy is as to whether the defendant has paid for all of the land which it purchased or agreed to purchase under the agreement. The agreement contemplated the acquirement of lands consisting of islands, marsh lands and shores, and edges appurtenant thereto. The nature of this property, together with other matters affecting the title, made a description of the lands involved quite difficult and caused voluminous testimony to be taken on behalf of the respective parties, with the result that a controversy has arisen as to many matters pertaining to the description of the land covered by the contract and the title thereto, but on the most important point in the case there is no dispute. The lease-

purchase agreement provided in effect that no money should be paid for any property purchased from plaintiff until the Attorney General had approved the title thereof. We think that plaintiff has failed to show that it had a good title to the land for which it seeks to recover payment, and that defendant has paid for all of the land acquired from plaintiff under the terms of the contract. But we do not base our decision upon this matter, as the defendant has a complete defense without it.

The Migratory Bird Act referred to in the title of the contract, in section 715 (e), Title 16, U. S. C. A., provides that—

> the Secretary of Agriculture may do all things and make all expenditures necessary to secure the safe title in the United States to the areas which may be acquired under this chapter, but no payment shall be made for any such areas until the title thereto shall be satisfactory to the Attorney General. [45 Stat. 1223.]

This provision of the act was made the subject of an opinion by the Attorney General [Opinions of Attorneys General, Vol. 37, pp. 95–97]. The main subject of the opinion of the Attorney General is different from the question involved in the case before us, but it quotes that portion of the statute set out above and in substance holds it to be in full force and effect. The findings show that the Attorney General did not approve the title to any of the land for which plaintiff seeks to recover a judgment and fails to show that the title of any of this land which is in dispute was satisfactory to the Attorney General. Consequently, neither the provisions of the statute nor those of the contract with reference to payment were complied with. Plaintiff therefore has no right to claim payment for this land and can not recover herein. It would serve no useful purpose to discuss the testimony on the other points raised in the argument of counsel.

Plaintiff's petition must be dismissed, and it is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

TRIEST & EARLE, INC., A CORPORATION v. THE UNITED STATES

[No. 43645. Decided November 6, 1939]

On the Proofs

Government contract; additional cost.—Where contractor, in reconstructing a Navy Yard pier, was required to furnish longer piles than provided for in the specifications which were part of the contract, and where the contract provided for an adjustment of price should a change be made in the contract, it is held that contractor is entitled to recover for the additional cost.

The Reporter's statement of the case:

Mathews & Trimble for the plaintiff.

Mr. William A. Stern II, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows, upon the stipulation of the parties:

1. Plaintiff is a corporation, organized and existing under the laws of the State of Pennsylvania, and has its principal office and place of business in Philadelphia, Pennsylvania.

2. On October 23, 1930, plaintiff and the defendant, represented by A. L. Parsons, Chief of the Bureau of Yards and Docks, Navy Department, entered into a formal contract, copy of which is annexed to the petition and marked Exhibit "A," whereby plaintiff in consideration of the sum of $194,876.00, undertook to reconstruct Pier Number 2 at the Navy Yard, Philadelphia, Pennsylvania, in accordance with the terms of the contract and specifications and General Provisions attached thereto. Work on the pier was to be started within 30 days after notice to proceed and to be completed within 300 calendar days after notice to proceed.

3. Under date of November 19, 1930, the Bureau of Yards and Docks notified plaintiff to proceed and completion of the work was due September 1, 1931. Plaintiff started the work promptly and completed it on October 26, 1931.

4. Paragraph 3-03 of the specifications No. 6281, attached to and forming part of the contract, provides as follows:

> 3-03. *Lengths of Piles.*—Bids shall be based on bearing and spur piles of lengths as follows: The five outer rows of bearing piles on each side of the pier shall be driven until their points penetrate to elevation minus 40.0; the inner rows of bearing piles and spur piles shall be driven until their points penetrate to elevations minus 35.0. Should longer piles, or a greater number of piles than shown, be required, adjustment in payment will be made in accordance with Article 3 of the contract.

5. The plaintiff based its bid as to the piles upon the lengths specified in paragraph 3-03 of the specifications, and after it had purchased about fifty per centum of the piles of the lengths specified and had them on hand, the Public Works Officer at the Navy Yard decided to use longer piles and a greater number of piles than those specified in the contract specifications, and on March 25, 1931, wrote plaintiff as follows:

> 1. Par. 3-03 of Spec. 6281 applying to your contract, states that piles shall be driven to depths of minus 35 and minus 40 feet, and that an adjustment in contract price will be made as provided by Article 3 of the contract, if piles of greater lengths than required by these depths are necessary.
>
> 2. Based on test piles which you have recently driven, it appears that the piles which would ordinarily be driven to elevation minus 35 will probably have to be driven to approximately elevation minus 40, in order to obtain the required bearing capacity.
>
> 3. It is understood that your order has been placed for about 50% of the piles in lengths ranging from 42 to 47 feet. Your suggestion made in conference this morning that the balance of the piles be purchased in lengths ranging from 47 to 52 feet, is satisfactory to the officer in charge.
>
> 4. As stated before, compensation for the extra length of piling, together with the cost of driving piles to the greater depth will be determined in accordance with Article 3 of the contract.
>
> A. G. BISSETT,
> *Lieut. Comdr. (CEC) U. S. N.*

6. Pursuant to the foregoing instructions the plaintiff ordered and caused to be driven longer piles and a greater number of piles than shown at an increased cost of $4,660.25. Paragraph 27 of the General Provisions attached to and forming part of the contract provides:

> In case of changes as contemplated by Article 3 of the contract, the cost thereof and any change in the time of performance involved shall be estimated by the officer in charge and reported by him to the Chief of the Bureau of Yards and Docks. If his estimate of cost exceeds $500, estimates of cost and time shall be made by a board appointed by or under the direction of the Chief of the Bureau of Yards and Docks, consisting of two officers or other representatives of the Government and one representative nominated by the contractor, which estimates shall be reported to the Chief of said Bureau. The Chief of the Bureau of Yards and Docks, as contracting officer, shall in all cases determine the change, if any, in price and time involved, subject to the right of appeal provided for in Article 15 of the contract. In determining the change in price, the cost of additions shall be the estimated actual cost to the contractor, and the cost of deductions shall be the estimated cost to the contractor as of the time when the contract was made. In arriving at the amount of the change, due allowance shall be made, in the discretion of the contracting officer, for overhead and general expense, plant charges, and other expense items of a similar nature. To all estimates of cost 10 per cent shall be added for contractor's profit.

7. A Board was duly appointed under the provisions of paragraph 27 of the General Provisions, which board met and considered the plaintiff's claim for increased costs due to the change in lengths and number of piles, and on January 21, 1932, recommended as follows:

> 1. Paragraph 3–03 of specification 6281, accompanying the subject contract, states as follows in regard to changes in the pile supports for the pier:
>
> "3–03. *Length of piles.*—Bids shall be based on bearing and spur piles of lengths as follows: The five outer rows of bearing piles on each side of the pier shall be driven until their points penetrate to elevation minus 40.0; the inner rows of bearing piles and the spur piles

shall be driven until their points penetrate to elevation minus 35.0. Should longer piles, or a greater number of piles than shown, be required, adjustment in payment will be made in accordance with article 3 of the contract. In case longer piles are necessary to secure a bearing value of not less than 40,000 pounds the lengths shall be determined by the formula * * *."

2. In order to secure a bearing value of at least 40,000 pounds, as specified, it was necessary for the contractor to furnish and drive longer piles and a greater number of piles than would have been required for the specified depths, and at additional cost to the contractor for the longer length piles and for other incidental expense because of this requirement.

3. The Board appointed by reference (a) has met at various times since the pile driving was started and submits, as this report, an estimate of the adjustment in payment which should be made in accordance with paragraph 3–03 of specification 6281.

4. The following is a detailed estimate of expenses incurred by the contractor because of the necessity of furnishing and driving longer piles and the greater number of piles. The unit prices include allowances for overhead profit and bond:

(a) Length of piling actually driven below contract depth, 4,008 feet @ 49⅜c per foot	$1,978.95
(b) Length of piling furnished over length required by contract requirements, but not actually driven,* 2.805 feet @ 23⅓c per foot	654.50
(c) Additional piles driven to obtain adequate bearing power, 20 piles @ $19 per pile	380.00
	$3,013.45

* The conditions encountered in pile driving were not uniform and in many instances the longer length piles were driven to refusal before the expected additional depth of penetration was secured. This resulted in excessive cut-offs of the tops of the piles in some instances. The 2,805 lineal feet used in item (b) is the total of these excessive cut-offs. The unit price represents the cost of the material and handling.

5. The Board recommends that the contractor be paid $3,013.45 for this work.

6. Paragraph 3–03 of specification 6281 does not provide for extension in contract time because of driving longer piles, and such extension has accordingly not been considered.

7. The $3,013.45 recommended above is acceptable to the contractor as reimbursement for that portion of additional work involved only in the furnishing and driving of additional and longer piles, but the contractor has asked further consideration and reimbursement of an additional expense closely associated thereto.

8. Reference (a) informed the Bureau that the necessity for furnishing longer piles to obtain the necessary bearing power would result in a surplus of 42-foot piles which had been furnished at the site for the work by the contractor. The reference recommended that the contractor be reimbursed for the cost of these piles, which would be taken over by the Yard. The Bureau, in reference (c), disapproved this recommendation.

9. The contractor has requested reconsideration of this decision, and has presented to the Board pertinent facts, cost data, and arguments for reconsideration of the Bureau's decision with request that these be forwarded to the Bureau. The contractor believed that the Bureau's disapproval in reference (c) related particularly to the taking over of the piles by the Yard, and that it did not actually cover the disapproval of the reimbursement of the contractor for the actual expense sustained by him on account of the surplus 42 ft. piles.

10. The Board, after examining this information, finds that the contractor has suffered a financial loss which can be attributed to the Government's action in requiring longer lengths of piles. The Board feels that the contractor's arguments are worthy of presentation to the Bureau and accordingly submits the following supplementary report of the Bureau's consideration.

11. The contract did not require the driving of test piles and such driving would have been impossible before the work was started, because of the presence of a crib pier which was removed as part of this same contract to make way for the reconstructed pier. With such information as was at hand, and in order to avoid delay in the contract, the contractor ordered approximately one-half the piles required for the work in 42- to 47-foot lengths, which were the lengths necessary to attain the specified depths of 35 and 40 feet. When the driving of piles was actively under way, however, as stated in paragraph 2 above, it became evident that longer piles would be necessary, and the officer in charge accordingly approved the purchase of 47- to 52-foot piles to complete the pile shipment.

12. On account of substituting these longer piles for the 42-foot piles which were too short to be used, a surplus of 258 42-foot piles resulted. Subsequent to the dates of reference (a) and (b), the contractor was able to sell these piles on a private contract, so that the final disposition did not involve the taking over of the piles by the Government, but did involve an actual loss

Reporter's Statement of the Case

to the contractor estimated to be $1,646.80. The following is a detailed statement of the expenses involved:

Original cost of 258 piles 42 ft. long @ 19c per ft	$2, 058. 84
Cost of handling piles from car to Pier No. 2	258. 00
Cost of handling piles from Pier 2 to storage	397. 00
Cost of handling piles from storage to second contract	425. 00
Towing bill	25. 00
Total cost	$3, 163. 84
Less credit for 258 42-foot piles @ 14c per foot	1, 517. 04
Net loss	$1, 646. 80

13. The contractor has asked that he be reimbursed by the Government in this amount, which includes no allowances for overhead expenses, profit, or bond.

14. The Board believes that the expense sustained by the contractor because of these surplus piles is a cost chargeable to the furnishing and driving of longer piles and that, if the loss is not allowed as a separate item, it should be applied to the unit price estimated for overlength of piles driven.

15. The Board accordingly estimates the adjustment in payment which should be made because of the necessity of furnishing and driving longer piles and a greater number of piles at $3,013.45, which amount should be increased to $4,660.25 if favorable reconsideration is given to payment for surplus piles.

(s) A. G. BISSETT,
A. G. Bissett,
Lieut. Comd. (CEC) U. S. N.
(s) J. C. MALLORY,
J. C. Mallory,
Contractor's Representative.
WILMER Z. KLINE,
Associate Civil Engineer.

8. Thereafter and on the 18th day of February, 1932, the Chief of the Bureau of Yards and Docks approved an increase in the contract price for the extra length of piles of $3,013.45, but refused to make any finding on plaintiff's claim for $1,646.80 for loss growing out of the purchase and disposition of 258 42-foot piles obtained, but not used, for the contract work, on the ground that it was beyond the jurisdiction of the contracting officer.

9. Plaintiff sustained an actual loss of $1,646.80 in ordering the piles and plaintiff's act in ordering the piles was reasonable and calculated to prevent delay in plaintiff's performance of the contract.

The plaintiff has made no assignment of its claim or any part thereof and has always borne true allegiance to the Government of the United States and has not aided, abetted, or given encouragement in any way to rebellion against her.

10. The plaintiff withdraws Paragraph IX, X, XI, XII, and XIII of the petition with prejudice to any further action or proceeding as to the cause of action therein purported to be alleged and plaintiff amends Paragraph XIV of the petition so that the prayer for judgment shall ask only for the sum of $1,646.80.

The court decided that the plaintiff was entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the court:

The facts in this case have been stipulated between the parties. No brief has been filed by the defendant. It will be seen from the facts that the plaintiff was required to furnish longer piles than provided for in the specifications which were a part of the contract and that Article 3 of the contract provided for an adjustment of price, should a change be made in the contract. The plaintiff was ordered by the defendant to purchase piles of longer length which occasioned an additional cost of $1,646.80. The Board of Changes appointed by and under the direction of the Chief of the Bureau of Yards and Docks, as provided in the contract, considered the additional cost occasioned by the change in the contract and specifications and arrived at the amount above stated as reasonable and just.

The plaintiff, having complied with all the conditions of the contract as changed, is entitled to recover the amount occasioned by the extra cost in the sum fixed by the Board. See *Moran Brothers Company* v. *United States*, 61 C. Cls. 73; *Levering & Garrigues Company* v. *United States*, 71 C. Cls. 739, 757; and *Griffiths* v. *United States*, 77 C. Cls. 542, 556.

Judgment is entered for the plaintiff in the sum of $1,646.80. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* and GREEN, *Judge*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

GEORGE D. MANSFIELD AND THE GEORGE C. MANSFIELD COMPANY v. THE UNITED STATES

[No. 43248. Decided May 1, 1939]

On the Proofs

Jurisdiction under special act.—Under the special jurisdictional act of August 19, 1935, it is held that Congress recognized the right of plaintiffs to relief and jurisdiction is conferred upon the Court to determine the claim on its merits and enter judgment for the amount of actual damages, if any.

Food Control Act.—The actions and orders of the Enforcement Division of the Food Administration in requiring the plaintiffs to sell immediately cheese held in storage for curing, it is held were beyond the provisions and intent of the Food Control Act.

Same.—The regulatory provisions of section 6 of the Food Control Act were intended to be applied reasonably, and in accordance with trade practices.

Same.—Seizure, forced sale or criminal prosecution was not authorized in the absence of facts to establish a wilful hoarding of food products.

The Reporter's statement of the case:

Mr. Walter D. Corrigan, Sr., and *Mr. W. L. Gold* for the plaintiffs.

Mr. J. Robert Anderson, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant.

Plaintiffs instituted this suit under a special act approved August 19, 1935, and asked judgment for a total of $266,-442.64 as the loss, including profit, alleged to have been sustained by reason of the actions and orders of the Enforcement Division of the Federal Food Administration in January 1918 compelling plaintiffs to sell immediately 3,672,661 pounds of cheese theretofore purchased in May, June, and early July, 1917, and stating that if said orders to sell were not strictly complied with the cheese would be seized and sold at plaintiffs' expense and that criminal prosecution would be instituted.

Plaintiffs allege (1) that in view of the facts and circumstances surrounding the cheese transactions, to which the

Food Administration did not give proper consideration and interpretation, the actions and orders of the Enforcement Division of the Food Administration were wrongful, arbitrary, and contrary to the provisions and intent of sections 4 and 6 of the Food Control Act approved August 10, 1917; and (2) that the special act under which the suit was instituted, and under which the claim is to be adjudicated, when interpreted in the light of the record before the Congress and the reports of the committees on claims of the Senate and the House of Representatives, recognizes and admits the right of plaintiffs to relief by way of compensation for the actual loss sustained by reason of the actions of the Food Administration, Division of Enforcement, and confers jurisdiction upon this court to hear, consider, and determine the merits of the claim for loss, and to enter judgment for the amount of such actual loss as may be found due.

On behalf of the defendant it is insisted, as was urged by counsel for the former Food Administration, Enforcement Division, before the Congressional Committees during the time the special act was under consideration, that plaintiffs are not entitled to any relief for the reasons (1) that the actions and orders in January 1918 of the Enforcement Division of the Food Administration were strictly in accordance with section 6 of the Food Control Act, which made it unlawful for any person to willfully hoard any necessaries; and (2) that the claim for compensation for loss is without merit for the reason that no actual loss was sustained.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiffs filed their petition herein pursuant to the provisions of a special act approved August 19, 1935, which reads as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the George C. Mansfield Company and George D. Mansfield, of Milwaukee, Wisconsin, are hereby authorized to bring suit against the United States to recover damages for any loss or losses which

they may have suffered because of the action of the Federal Food Administration, division of enforcement, in directing and compelling said George C. Mansfield Company and said George D. Mansfield to sell certain cheese products. Jurisdiction is hereby conferred upon the Court of Claims of the United States to hear, consider, and determine such action on its merits, and to enter decree or judgment against the United States for the amount of such actual loss, if any, as may be found due to said George C. Mansfield Company and said George D. Mansfield, without interest, with the same right of appeal as in other cases, notwithstanding the lapse of time or statute of limitations or the tortious character of the action: *Provided*, That such action shall be brought within six months from the date that this Act becomes effective. (49 Stat. 2148.)

2. The correct name of the plaintiff corporation is "The Geo. C. Mansfield Company." It has been occasionally referred to by the parties hereto, both in correspondence and testimony, as "George C. Mansfield Company" and "The George C. Mansfield Company." "The Geo. C. Mansfield Company" is a Wisconsin corporation, and there is no other Wisconsin corporation of a similar name. It was incorporated in 1888, since when it has been engaged in the manufacture of ice cream and butter, conducting a cold storage business, and buying and selling, at wholesale, butter, eggs, cheese, and other dairy products.

George D. Mansfield was president and treasurer and the owner of a majority of the stock of the corporation at all times material herein up to June 18, 1928. At the time of its dissolution he was the owner of all of its capital stock. On February 1, 1927, the corporation sold all of its property and assets with the exception of the claim here in litigation, which claim was excepted and reserved from said sale. On June 18, 1928, the corporation was voluntarily dissolved.

3. About March 13, 1917, George D. Mansfield, plaintiff, attended a convention of dealers in dairy products at which he was advised that the British Government would be in the market for cheese, it having decided to use cheese as a regular army ration. The English cheese trade required that cheese be cured in cold storage for a period of from twelve to fifteen months. On March 14, 1917, The Monarch Cold

Storage Company of Chicago advised George D. Mansfield to invest in cheese because of said English demand, offering to Mansfield its cold storage facilities and agreeing to help him finance cheese purchases. Mansfield had prior thereto, at times, depended on The Monarch Cold Storage Company for cold storage facilities. It had been the custom of dealers in cheese to purchase heavily during the months of May, June, and July of each year, that being a period of surplus production.

4. During the period beginning in May 1917, and ending early in July 1917, George D. Mansfield purchased in good faith and in the regular course of business 3,672,661 pounds of cheese with the intention of keeping same in cold storage for a reasonable curing period until he could secure a reasonable profit thereon. The curing period for most of the cheese so purchased was complete between August 1, and September 1, 1918. The annual cheese production in the United States was about 270,000,000 pounds.

During this period he purchased, in the name of the company, cheese which had been manufactured by the cheddar process, which was designated according to the size of the package, and known as: cheddars, twins, daisies, and long horns. The purchases were made at Plymouth, Wisconsin; Chicago, Illinois; New York City; and Lowville, New York, generally through a broker, the price being gauged by market prices at Plymouth, Wisconsin, plus the freight charges. The cheese was manufactured in the State of Wisconsin, except for a small portion which was manufactured in New York State. It is not known by whom any of the cheese was manufactured. About 75 percent of the cheese so purchased was stored at The Monarch Cold Storage Company, Chicago, Illinois, and other cheese was stored at The National Cold Storage, New York City; Merchant's Refrigerating Company, New York City; Lowville Cold Storage, Lowville, New York; and The Geo. C. Mansfield Company, Milwaukee, Wisconsin. The cheese in New York City and Lowville, New York, was in storage when purchased, but other cheese was removed from where it had been bought and placed in storage at Milwaukee, Wisconsin, or Chicago, Illinois. Most of the cheese, when purchased, was but a few weeks old.

5. The Geo. C. Mansfield Company had no financial interest in the purchase of the cheese in controversy, although the purchases were all made in the name of said company, which helped in financing the same. About 10 percent of the money used for the purchase of the cheese was furnished by this company, and loans from various warehouses represented 90 percent of the invoice. George D. Mansfield was to have the profits, if any, and he was to stand all losses, if any, on said cheese investment. He did in fact suffer all losses of said cheese investment and saved The Geo. C. Mansfield Company harmless therefrom. All of the cheese purchases herein considered were made prior to the passage on August 10, 1917, of the "Food Control Act," occasionally referred to as the Lever Act. (40 Stat. 276.)

The borrowings began immediately after plaintiff started to accumulate the cheese, and continued until 60 days after they collected on the last sale. Money was borrowed from the various warehouses and The First Wisconsin National Bank, and The Geo. C. Mansfield Company charged George D. Mansfield interest on the money loaned by the company to carry the difference between the cost of the cheese and the loan made by the warehouse. George D. Mansfield never became liable as an endorser on notes to The First Wisconsin National Bank which he signed as president of The Geo. C. Mansfield Company. Insurance was paid, as the banks and warehouses would not loan money on any commodity unless it was insured. The cheese would be shipped to the warehouse with a sight draft attached to the bill of lading, which was usually paid before unloading the cheese, and The Geo. C. Mansfield Company would be notified of any shortages. The warehouse would in turn bill The Geo. C. Mansfield Company for the purchases.

The Geo. C. Mansfield Company was never engaged in the manufacture of cheese. It had not purchased large quantities of cheese for future sale in the manner in which this cheese was purchased during May, June, and July 1917. Prior to 1917 plaintiff had not depended upon Chicago storage warehouses for the storage of its cheese, although some had been stored there prior to 1917. Cheese of various descriptions had been retailed to the grocery trade in a

small way prior to 1917. However, the total cheese purchases by The Geo. C. Mansfield Company from 1908 to 1916 were as follows:

Year	Number boxes	Pounds
1908	113	11,565
1911	400	21,014
1915	1,526	98,177
1916	2	243
Total	2,041	130,999

6. After the passage of the Food Control Act on August 10, 1917, the President, on August 10, 1917, issued an Executive Order providing for the organization of the United States Food Administration. October 8, 1917, pursuant to said Act of Congress, the President, by proclamation, announced that it was essential in order to carry into effect the purposes of said Act to license the importation, manufacture, storage, and distribution of certain commodities, among others milk, butter, and cheese, including the operation of cold storage warehouses in which food products were, or had been, placed and held for thirty days or more, and that it should be unlawful for any person, firm, corporation, or association to engage in or carry on any business, as specified in the Proclamation, after November 1, 1917, without first securing a license so to do.

October 26, 1917, The Geo. C. Mansfield Company, by George D. Mansfield, its president, filed with the United States Food Administration an application for a license to engage in and carry on the business of a wholesaler or jobber in cheese, and as a cold storage warehouse operator. November 1, 1917, the United States Food Administrator granted it license No. 08608. The license so granted to The Geo. C. Mansfield Company was revocable at any time for violation thereof by any officer, agent, or employee of the licensee, or of any of the provisions of said Act or of any regulations subsequently issued thereunder.

Rule 13 of the general regulations of the Food Administration provided:

> **The licensee shall not, without the written consent of the United States Food Administrator, or his duly authorized representative, keep on hand or have in posses-**

> sion or under control, by contract or other arrangement, at any time, any food commodities in a quantity in excess of the reasonable requirements of his business for use or sale by him during a period of 60 days: *Provided, however,* That this rule shall not prevent the licensee from storing, in sufficient quantities to fill his reasonable requirements throughout the period of scant or no production, any of the following commodities: * * * cheese, * * *.

Rule 5 of said regulations provided:

> The licensee in making loans, either directly or indirectly, to patrons or other persons concerned, on commodities required to be licensed, or who shall become liable on notes covering such loans by indorsement, guarantee, or otherwise, shall limit the amount of such loans, including all advance charges, to a maximum of 70 per cent of the market value of said commodity on the date of the said loan. A margin of not less than 30 per cent on all such loans and advance charges shall be maintained at all times.

7. On November 1, 1917, George D. Mansfield requested the chief clerk of The Geo. C. Mansfield Company to transfer to the company all goods standing in his name on the books of said company. A license from the United States Food Administration was required after November 1, 1917. George D. Mansfield had no Federal license to buy, sell, or deal in cheese. All the cheese was in the Company's name. The purchases of cheese were made during the months of May, June, and July 1917. On January 23, 1918, there was on hand 60,142 boxes of cheese which weighed 3,610,445 pounds, when purchased, at a cost of $867,005.63, including brokerage of $4,513.06.

8. During the early part of January 1918 an investigating agent of the Food Administration ascertained that The Monarch Refrigerating Company, of Chicago, had in storage for curing a large quantity of cheese. Upon inquiry, the refrigerating company directed the agent to George C. Mansfield Company and George D. Mansfield, of Milwaukee, Wisconsin. The agent thereupon called upon plaintiffs and after examining their books as to the quantities and dates of purchase of the cheese inquired what they intended to do with the cheese. He was advised that it had been purchased in May, June, and July 1917, as shown by the

books, that it was being held in storage for curing, and that they intended to sell it as soon as the curing period had expired and as soon as they could obtain a reasonable profit thereon. On January 19, 1918, George D. Mansfield conferred with George Haskell, a representative of the Food Administration, at Chicago, Illinois, who advised Mansfield to sell the cheese within three months and that if he did not do so he would be subject to a penalty of $5,000 or two years in prison and that the Food Administration would seize the cheese and sell it and charge the George C. Mansfield Company, in whose name the cheese had been stored, with the cost of seizure and sale. Haskell reported the matter to the Federal Food Administration, Enforcement Division, at Washington. On January 22, 1918, the Enforcement Division, Food Administration, wired Mansfield that—

> Have information that you have purchased and have under control large quantity of cheese. Wire us how much you have, what you propose doing with it, and how soon.

Plaintiffs' reply to this of January 22 stated that—

> Our cheese purchased during storage season late May, June, and early July. Total holding approximately 3,500,000 pounds. At Mr. George Haskell's request was fully interviewed at Haskell's Office January 19. Ready to sell cheese as soon as can secure reasonable profit. Not able to do that yet.

On January 23, the Enforcement Division of the Food Administration wired plaintiffs as follows:

> Food Administration not interested in whether you make profit or loss. Commence selling cheese immediately at market, report sale to this department from week to week. Send immediately exact inventory of cheese, places where stored. Unless you do this Food Administration will seize cheese and prosecute under the act. [Food Control Act, August 10, 1917.]

Pursuant to this order, plaintiffs on January 24 sent to the Enforcement Division, Food Administration, an inventory of the cheese in cold storage plants and stated—

> Would also say that we faithfully promised Mr. Haskell in the interview we had with him in Chicago and which we mentioned in our first telegram to you,

that we would start to move these cheese in the near future at the market, and that we would make a determined effort to have them disposed of during the next three months. We have offered out in the neighborhood of 3,000 boxes of cheese today and want to assure you that we will cooperate and comply with your request.

To this the Enforcement Division of the Food Administration replied January 30, 1918, that—

I expect to give you the three months promised you by Mr. Haskell, to dispose of this cheese provided I feel that you are acting in good faith in your endeavors to dispose of same, but I do not intend to allow you to wait a month or two weeks even to find a customer. You are to dispose of it as fast as possible, and if you can not sell it in large quantities, you are to sell it in small, but sell it you must.

Under the order of immediate sale and threat of seizure and criminal prosecution, plaintiffs proceeded to sell the cheese as rapidly as possible and furnished the Enforcement Division of the Food Administration with weekly reports of sales. Because of the order and threat of the Food Administration, Enforcement Division, plaintiffs considered and felt that, although a reasonable curing period customary in the trade had not expired, they were forced to sell the cheese immediately at the best prices obtainable in order to minimize their loss and avoid prosecution. Plaintiff George D. Mansfield, who was the owner of the cheese, proceeded immediately to sell, and ultimately did sell, all the cheese much sooner than he otherwise would have sold it in due course of business and as customary in the trade in the handling and disposing of cheese purchased during the season of surplus production, because of the order and threat of the Food Administration. He disposed of the cheese as rapidly as possible and had sold all of it by April 5, 1918. It was sold at the best price obtainable at the time of the forced sales. Mansfield had borrowed certain money with which to finance the several purchases during the period May, June, and early July, and those who had loaned him money on account of the cheese transactions were not pressing him for payment. George D. Mansfield's credit was

good. Sales of the cheese in the ordinary course of business relating to dealings in such commodity would not have been made at the time the cheese was sold under the orders of the Food Administration, nor would Mansfield have placed the cheese upon the market at that particular time by reason of the fact that a reasonable curing period had not expired; the cheese was placed upon the market and sold as rapidly as purchasers could be found therefor, because of the order and threat given by the Food Administration, Enforcement Division. But for this peremptory order of sale and threat of seizure and criminal prosecution plaintiffs, in the ordinary course of business and in accordance with the custom of the trade, would have held the cheese for a reasonable time for curing, at the expiration of which reasonable curing period the cheese could have been sold without loss and, also, at a reasonable profit in excess of the purchase price during the production season of May, June, and early July, and the carrying charges. Substantially all the cheese sold pursuant to the order of the Enforcement Division, Food Administration, was sold to the British Buying Commission at a price of 24 cents a pound, free aboard boat at New York or Philadelphia. Plaintiffs had sold no cheese to the British Government prior to January 23, 1918. Plaintiffs realized from 2 to 2½ cents a pound more for cheese which was not sold to the British Government but which had been sold in odd lots, but the order of the Enforcement Division, Food Administration, that the cheese must be sold within three months would not permit plaintiffs to sell it in small quantities. The 60,142 boxes on hand January 23, 1918, weighed 3,563,628 pounds when sold, and the entire quantity was sold for $859,911.49. On April 5, 1918, plaintiffs reported to the Enforcement Division of the Food Administration that all the cheese on hand had been sold.

9. As a result of the forced sales of the cheese, George D. Mansfield, plaintiff, sustained an actual loss in the sum of $122,919.40. Had he not been denied by the Food Administration the right to exercise his reasonable judgment none of the cheese would have been sold earlier than August 1 and probably not until September, October, or November

1918. Had he been permitted to sell the cheese in September 1918 he would have sustained a loss of only $3,823.04; had he been permitted to hold it until October 1918 he would have made a profit of $143,523.24; had be been permitted to keep it until November 1918 he would have made a profit of $165,771.85. These figures are based on the Plymouth market, which is conceded to be the standard cheese market.

10. At the time of dissolution of The George C. Mansfield Company, it had no creditors. George D. Mansfield was at the time of dissolution the sole owner of all the stock of the company. He is the sole owner of the claim herein sued on and has neither sold, assigned, nor transferred said claim, or any part thereof, to any person. Neither George D. Mansfield nor The George C. Mansfield Company has ever been indebted to the United States.

The court decided that the plaintiffs were entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

When the special act of August 19, 1935, under which this suit was instituted, is interpreted, as it must be in the light of the facts and circumstances obtaining at the time of the actions and orders of the Enforcement Division of the Food Administration in 1918, all of which were fully disclosed to and considered by the Congressional claims committees of the Senate and the House of Representatives which recommended the passage of the Act, and also when such facts and circumstances, together with the reports of the Senate and House claims committees, are considered in the light of the provisions and intent of section 6 of the Food Control Act of August 10, 1917, we are of opinion that the special act recognized the right of plaintiffs to relief and for compensation for such actual loss, if any, as might be found to have been sustained by reason of the action of the Enforcement Division of the Food Administration in directing and compelling plaintiffs to immediately sell the cheese in question. To that end the special act confers jurisdiction upon this court to hear, consider, and determine the claim on its merits and to enter judgment for the amount of such actual

loss, if any, without interest, notwithstanding the lapse of time or the statute of limitation or the tortious character of the action.

The record discloses that the bill, which on August 19, 1935, became the special act under which this suit was instituted, was introduced in the Senate and the House of Representatives about 1924. At that time, enactment of the bill for the relief of plaintiffs was opposed on behalf of the government, on the ground that "the claim is wholly without merit." This opposition to the bill was set forth in a lengthy memorandum of February 28, 1924, to the chairman of the Senate claims committee by the former chief auditor, Enforcement Division of the Food Administration, who was then an employee of the United States Grain Corporation of the Commerce Department and the custodian of the records of the former Food Administration. Hearings were held before the Senate claims committee March 3, 1924. Witnesses were called and examined before the committee by counsel for plaintiffs and the various documents were identified and received in evidence. The former chief auditor of the Enforcement Division of the Food Administration appeared in opposition to the passage of the bill and cross-examined all of the witnesses produced on behalf of plaintiffs.

Subsequently, in February 1930, a hearing on the bill which subsequently became the special act in this case was held before the claims committee of the House of Representatives. Evidence, oral and documentary, was then presented to the committee, and the House Claims Committee, as had the Senate Claims Committee, went specifically into the facts and circumstances surrounding the purchases of cheese by plaintiffs as well as the facts and circumstances concerning the actions and orders of the Enforcement Division of the Food Administration in January 1918 ordering and compelling plaintiffs to sell the entire amount of cheese on hand within three months thereafter. All the facts and circumstances were considered by the committee in connection with the Food Control Act of August 10, 1917, in order to ascertain, as the committee stated, whether the facts and circumstances justified the conclusion that plaintiffs should be compensated for any actual loss sustained by reason of the

enforced orders of the Food Administration under the supposed authority of section 6 of the Food Control Act of August 10, 1917,—in other words, whether the cheese purchases of plaintiffs made in good faith and in the ordinary course of business prior to the enactment of the Food Control Act, and on hand at the time that act was approved, constituted a violation of the statute, and whether the cheese purchases completed in May, June, and July 1917 constituted a transaction which a reasonably prudent man familiar with the trade relating to that character of commodity would consider a reasonable and legitimate transaction. Subsequent to the hearing before the claims committee of the House of Representatives a written memorandum on behalf of the former Food Administration in opposition to the passage of the special act was transmitted to the committee on March 10, 1930, by the former Food Administration officer.

During the hearings before the Senate and the House of Representatives claims committees, it was pointed out by the committees that they were not interested in evidence as to the details of the claim or the amount of loss but that they were interested in the question whether the cheese purchases prior to the enactment of the Food Control Act constituted a reasonable business transaction of such a character as to justify the Congress in concluding that claimant was entitled to relief. Subsequent to the above-mentioned hearings, and upon the evidence submitted, the Senate and the House claims committees,[1] in their reports recommending passage of the special act, stated—

> The facts before this committee are believed to show that claimants are entitled to relief. Your committee, however, does not here pass upon the question of the amount to which claimants may be reasonably entitled, but recommends that this question be referred, as contemplated in the bill, to the Court of Claims for proper adjudication.

The question which the special act in this case leaves open for determination is the amount of the actual loss suffered

[1] Senate Report No. 1571, 71st Cong., 3rd sess. House Report No. 2138, 71st Cong., 3rd sess.

because of the actions of the Food Administration directing and compelling the sale of the cheese. In *Edwards* v. *United States*, 79 C. Cls. 436, it was held that

> The authority of Congress to prescribe the basis on which a claim shall be adjudicated, that is, to prescribe the conditions under which a citizen may be compensated for losses suffered under a contract, or even where no contract exists, or to create a liability on the part of the government where no legal liability in fact exists and to waive any legal defense on the part of the government, is no longer subject to question.

See also, *Nock* v. *United States*, 2 C. Cls. 451; *Boudinot* v. *United States*, 18 C. Cls. 716, 728; *The American Trading Co.* v. *The Chinese Indemnity Fund*, 47 C. Cls. 563; *Southern Pacific Co.* v. *United States*, 68 C. Cls. 223; *Garrett* v. *United States*, 70 C. Cls. 304; *Alcock* v. *United States*, 74 C. Cls. 308, 375. The evidence shows that the actual loss sustained by George D. Mansfield by reason of the action of the Federal Food Administration, Division of Enforcement, in directing and compelling him to sell the 3,672,661 pounds of cheese theretofore purchased by him in the regular course of business prior to the passage of the special food act of August 19, 1935, was $122,919.40 (finding 9). This is the amount which, under the jurisdictional act, plaintiff, George D. Mansfield, is entitled to recover, without interest.

If it be assumed, as is insisted on behalf of the defendant, that the special act does not recognize a liability for the actual loss sustained by plaintiffs, because of the action of the Enforcement Division of the Food Administration, we are, nevertheless, of the opinion that upon the facts and circumstances disclosed by the record plaintiffs are entitled to recover. Under the facts and circumstances obtaining, the actions and orders of the Enforcement Division of the Food Administration were, we think, clearly beyond the provisions and intent of sections 4 and 6 of the Food Control Act approved August 10, 1917. Those sections made it unlawful for any person to *willfully hoard* any necessaries, and necessaries were not deemed to be hoarded within the meaning of that act unless they were (a) held, contracted for, or arranged for by any person in a quantity

in excess of his reasonable requirements for use or consumption by himself or dependents for a reasonable time; (b) held, contracted for, or arranged for by any manufacturer, wholesaler, retailer, or other dealer in a quantity in excess of the reasonable requirements of his business for use or sale by him for a reasonable time, or reasonably required to furnish necessaries produced in surplus quantities seasonably through the period of scant or no production; or (c) withheld, whether by possession or under any contract or arrangement, from the market by any person for the purpose of unreasonably increasing or diminishing the price. The facts and circumstances existing and known at the time of the actions and orders of the Enforcement Division of the Food Administration in January 1918 show clearly that plaintiffs were not willfully hoarding necessaries and that the purchases which Mansfield first decided to make in March 1917, and which purchases he actually made during the period of surplus production in May, June, and early July, 1917, were not unreasonable within the meaning of any of the provisions of section 6 from the standpoint of an ordinary business transaction by one dealing in cheese products. The total purchases of approximately 3,600,000 pounds of cheese compared to the total production of 270,000,000 pounds at that time was not such a transaction as would have the effect of unreasonably increasing the general market price when held in storage for a reasonable curing period. The regulatory provisions of section 6 of the Food Control Act were intended, as the act expressly stated, to be applied *reasonably* and, obviously, in accordance with the reasonable and well-known rules and practices of the trade relating to various food products. This the Enforcement Division of the Food Administration failed, in the instant case, to do. On the contrary the Enforcement Division, when it found that plaintiff Mansfield prior to the enactment of the Food Control Act had purchased in due course and in a reasonable business transaction a quantity of cheese which he had placed in storage for a reasonable curing period, as was customary in that trade, commanded plaintiff under threat of seizure of the cheese and of criminal prosecution to immediately sell the entire amount of the cheese regardless

of price and of whether or not he sustained a loss or made a profit. When plaintiffs were ordered by the Enforcement Division of the Food Administration early in January 1918 to immediately sell the cheese, they complied with the order with the result that an actual loss, including interest, carrying charges, and freight, of $122,919.40 was sustained. The evidence shows that if the Enforcement Division of the Food Administration had allowed plaintiffs a longer period within which to sell or had allowed plaintiffs to place the cheese upon the market and sell it after a reasonable curing period as the Act of August 10, 1917, seems to have contemplated, and which was recognized in the cheese trade as being reasonable and necessary, the cheese could have been sold at such a price as would not have resulted in any actual loss. We think it is clear from the provisions of sections 4 and 6 of the Food Control Act of August 10, 1917, that seizure, forced sale, or criminal prosecution was not authorized in the absence of facts to establish a willful hoarding of food products. Such facts did not exist in this case. Moreover, we think the Food Control Act contemplated in a case such as the one at bar that if it should be deemed advisable by the Food Administration that any food supplies previously purchased in good faith and on hand at the time of the enactment of the act be placed on the market that this should be done as nearly as possible in accordance with the usual and the recognized practices of the trade. In passing upon the constitutionality of certain penal provisions of the act of August 10, 1917, the Supreme Court in *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, held invalid the provisions of Section 4 which made it an offense for any person "willfully to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries." Those provisions were declared invalid on the ground that they fixed no ascertainable standard of guilt and were inadequate to inform persons accused of violations of the nature of the accusation against them, and on the further ground that the section did not forbid any specific or definite act but left open the widest conceivable inquiry, the scope of which no one could foresee and the result of which no one could foreshadow or adequately guard against. Following the decision

in the *Cohen* case, *supra*, the Supreme Court in *Merritt* v. *United States*, 255 U. S. 579, reversed, upon confession of error, the decision of the lower court, 264 Fed. 870, holding constitutional and sustaining a conviction under the hoarding provisions.

The Mansfield Company became dissolved in June 1928 and George D. Mansfield, as the owner of all its stock, became the owner by operation of law of whatever interest the Mansfield Company may have had in the claim. Judgment will be entered in favor of George D. Mansfield for $122,-919.40. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

JOSEPH H. WALTON v. THE UNITED STATES

[No. 44028. Decided May 1, 1939]

On Demurrer

Pay and allowances; retirement pay of warrant officer.—The Act of July 31, 1935, providing for promotion and retirement, applies only to commissioned officers; if Congress had intended to include "warrant officers" within the general term "officers of the Army" it would have done so. Pertinent cases cited and applied or differentiated.

Same.—"Warrant officers" may not be generally classified with either commissioned officers or enlisted men; it is a distinct classification, ranking after commissioned officers but before enlisted men.

The Reporter's statement of the case:

Mr. Lewis Landes for the plaintiff.

Mr. Charles H. McCarthy, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant.

BOOTH, *Chief Justice*, delivered the opinion of the court:

Defendant demurs to plaintiff's petition generally on the ground that it does not state a cause of action. Plaintiff is a retired warrant officer of the Army and signs himself "Major,

U. S. A. retired." The War Department addresses him as "Warrant Officer Joseph H. Walton."

The claim is based upon the act of July 31, 1935, 49 Stat. 505, 507, stating that "any officer of the Regular Army * * * whose application for retirement under the provisions of this section" has been approved by the President shall be retired in the grade of major, etc. The Special Orders of the War Department specifically retires the plaintiff on account of physical disability under the provisions of Section 4a of the act of June 4, 1920, 41 Stat. 759, 761, and Section 1251 Revised Statutes. It further states that "Warrant Officer Walton is advanced on the retired list of the Army to the rank of major under the provisions of the act of Congress approved May 7, 1932." This act, 47 Stat. 150, is entitled "an Act to give war-time commissioned rank to retired warrant officers and enlisted men" and provides in substance that warrant officers and enlisted men who served in the Army during the World War and who may have been or hereafter may be retired shall on the date of approval of this Act or upon retirement be advanced to the highest commissioned, warrant, or enlisted grade held by them during such war: *Provided*, "That no increase in active or retired pay or allowances shall result from the passage of this act."

The act of July 31, 1935, 49 Stat. 505, 507, Title 10, Sec. 971b, U. S. Code, Supp. II, under which plaintiff asserts this claim, refers to "any officer of the Regular Army who served as a commissioned officer in the Army of the United States prior to November 12, 1918," and states that they shall be retired in the grade of major "with retired pay computed as hereinbefore provided as for a major with the same length of service."

A reference to the above act discloses that its title is "An Act to promote the efficiency of national defense"; that it refers only to commissioned officers of the Army, and in other sections of the same act there are specific provisions relating to colonels, captains, first and second lieutenants and chaplains, all of whom are commissioned officers of the Army. It is therefore apparent that the provision quoted above, which is Section 5 of the act, applies only to commissioned officers.

In the U. S. Code there are separate chapters dealing with Commissioned Officers, Warrant Officers, and Enlisted Men,

indicating that "warrant officers" may not be generally classified with either commissioned officers or enlisted men. It seems to be a distinct classification, ranking after commissioned officers but before enlisted men.

Title 10, Sec. 593, U. S. Code provides:

> Warrant officers other than those of the Army Mine Planter Service shall take rank next below second lieutenants and among themselves according to the dates of their respective warrants.

Title 10, Sec. 594, U. S. Code provides:

> Warrant officers other than those of the Army Mine Planter Service, shall, except as otherwise provided in Title 37, receive the allowances of a second lieutenant, and shall be entitled to retirement under the same conditions as commissioned officers.

Title 37, Sec. 13, U. S. Code refers to pay and allowances of "warrant officers and enlisted men of the Army," but Sec. 26a of that title refers to retired pay of "retired officers and warrant officers of the Army," etc.

The plaintiff's contention may be summed up in this passage from his brief:

> If Congress had intended to restrict the benefits of the Act of 1935 to the commissioned personnel of the Army, it would have said so.

It seems, however, from what has been said that if Congress had intended to include warrant officers within the general term "officers of the Army" it would have done so. The cases cited by plaintiff do not sustain the contention that in view of the statutes warrant officers are "officers of the Army." *Allen* v. *United States*, 67 C. Cls. 558. In that case the court held that an act referring to "officers" of the Navy comprehended commissioned officers only and did not include warrant officers.

It is apparent that plaintiff's position is not well taken and that the defendant's demurrer should be sustained and the petition dismissed. It is so ordered.

See *Scholl* v. *United States*, 82 C. Cls. 606, certiorari denied, 299 U. S. 592.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and GREEN, *Judge*, concur.

Reporter's Statement of the Case

THE SIOUX TRIBE OF INDIANS v. THE UNITED STATES

[No. C-531-(6). Decided May 29, 1939]

On the Proofs

Indian claims; obligation of the Government under treaty limited to reasonable time.—The provisions of the treaty of 1868 between the Government and the plaintiff tribe of Indians for furnishing seeds and agricultural implements to families and individuals of the tribe who removed to the reservation, selected tracts of land and commenced farming, did not obligate the Government for an indefinite period but only for a reasonable time, as decided in *The Sioux Tribe of Indians* v. *The United States*, C-531-(5), 86 C. Cls. 299.

Same.—The period of ten years over which the Secretary of the Interior held the appropriations made by Congress for purchasing seeds and agricultural implements was a reasonable time.

Same.—The plaintiff tribe cannot maintain suit and recover on this character of claim, which is not a tribal claim but concerns the rights of and obligations to individual Indians, members of the tribe.

The Reporter's statement of the case:

Mr. Ralph H. Case for the plaintiff. *Messrs. Kingman Brewster, J. S. Y. Ivins, C. C. Calhoun, O. R. Folsom-Jones, Richard B. Barker,* and *John Ward Cutler* were on the brief.

Mr. George T. Stormont, with whom was *Mr. Assistant Attorney General Carl McFarland,* for the defendant.

Plaintiff tribe seeks to recover $782,545.54 for the alleged failure of the United States to fulfill its alleged obligation under Art. 8 of a treaty entered into in 1868 to furnish seeds and agricultural implements to 4,549 heads of families alleged to have been rightfully entitled to such articles of the value of $175 each. From the amount of $796,075 thus obtained plaintiff deducts $13,529.46 actually expended by the defendant for seeds and agricultural implements, and the balance of $782,545.54 is sought to be recovered in this suit.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. By an act approved June 3, 1920, 41 Stat. 738, Congress authorized the plaintiff tribe to bring suit in this court for the determination of the amount, if any, due the tribe under any treaties, agreements, or laws of Congress. Several amended petitions with reference to each question raised by the tribe were filed in 1934, and thereafter this case was tried and submitted.

2. In 1868 a treaty was concluded between the United States and the various bands of the Sioux Nation comprising the plaintiff herein. The treaty was signed by the Indian bands at various dates from April 29, 1868, to November 6, 1868; was ratified by the Senate of the United States on February 16, 1869, and proclaimed by the President on February 24, 1869, 15 Stat. 635.

By Article 2 of this treaty a certain described district of country was set apart "for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them."

By Article 6 it was provided that if any individual among the said Indians, being the head of a family, should desire to commence farming he should have the privilege of selecting a tract of land within the reservation not exceeding 320 acres in extent and that any person over eighteen years of age, not being the head of a family, might select in like manner for purposes of cultivation a quantity of land not exceeding 80 acres in extent.

Art. 8 provided as follows:

> When the head of a family or lodge shall have selected lands and received his certificate as above directed, and the agent shall be satisfied that he intends in good faith to commence cultivating the soil for a living, he shall be entitled to receive seeds and agricultural implements for the first year, not exceeding in value one hundred dollars, and for each succeeding year he shall continue to farm, for a period of three years more, he shall be entitled to receive seeds and implements as aforesaid, not exceeding a value of twenty-five dollars.

By Article 10 it was provided, among other things:

> And it is stipulated that the United States will furnish and deliver to each lodge of Indians or family of persons legally incorporated with them, who shall remove to the reservation herein described and commence farming, one good American cow, and one good well-broken pair of American oxen within sixty days after such lodge or family shall have so settled upon said reservation.

By Article 11 the Indian parties to the treaty relinquished all right to occupy permanently the territory outside of the reservation, but reserved the right "to hunt on any lands north of North Platte, and on the Republican Fork of the Smoky Hill River, so long as the buffalo may range thereon in such numbers as to justify the chase."

By Article 15 the Indians agreed that when the agency house referred to in Article 4 was constructed they would regard the reservation as their permanent home, and would make no permanent settlement elsewhere but would have the right to hunt as stipulated in Article 11.

3. By an agreement entered into between the United States and the Oglala Sioux under Red Cloud and the Brulé Sioux under Spotted Tail on June 23, 1875, these Indians, for a consideration, relinquished "all privileges of hunting and all other rights and privileges in Nebraska and on the Republican Fork of the Smoky Hill River" secured to them in the treaty of 1868, restricting the surrender, however, insofar as rights and privileges in Nebraska were concerned, to lands therein south of the divide of the Niobrara River.

4. By the agreement of September and October, 1876, between the United States and the plaintiff Indians, ratified in the act of February 28, 1877, 19 Stat. 254, the Sioux tribe made a further cession of lands to the United States, relinquished all privileges of hunting outside the reservation, and declared Article 16 of the treaty of 1868 to be abrogated.

5. In the years immediately following the treaty of 1868 there was little change in the mode of life of the Sioux Indians. Only a few of them complied with the provisions of the treaty and settled at the various agencies along the Missouri River. The great bulk continued to roam, as before, over their vast reservation. Large numbers of them, vari-

ously estimated at from 3,000 to 8,000, in violation of their treaty agreement, took up their permanent residence in the valley of the Yellowstone River outside of the "unceded Indian territory," where they maintained a hostile and rebellious attitude toward the Government and resisted all efforts to induce them to reside within the limits of the reservation. Such of them as resided, more or less permanently, at the agencies, adopted such a hostile, truculent, and rebellious attitude towards the Government officials that in 1873 the Commissioner of Indian Affairs was compelled to recommend that military posts be established at each of the agencies so as to enable the agents to conduct affairs in an orderly manner.

In addition to the Sioux, who had taken up their residence in the valley of the Yellowstone, the thousands of Oglalas under Red Cloud and the thousands of Brulés under Spotted Tail, who together composed more than one-half of the total Sioux population, refused to take up their residence upon the reservation and, in violation of their treaty promise, maintained their permanent homes in Wyoming and Nebraska.

War finally broke out between the Government and the Sioux located in the valley of the Yellowstone. During the progress of the war the hostiles received such large accessions from the different agencies that the number remaining thereat was reduced to about one-third of what it had been. The war commenced on March 17, 1876, and continued until September 10, 1877. The number of warriors in the field was estimated by the Secretary of War to be from 2,500 to 3,000. After the cessation of hostilities the majority of the hostiles returned to the agencies, but Sitting Bull, one of the leaders, and his followers, numbering nearly 3,000, did not return thereto until July 1881.

Ignoring the provisions of the agreements of June 1875 and September 1876, the Sioux, under Red Cloud and Spotted Tail, persisted in living outside the reservation and refused to take up their abode thereon. However, in August 1878, as a result of efforts by a second commission appointed for the purpose, these Indians consented to go upon the res-

ervation, the Oglalas being located at the present Pine Ridge agency and the Brulés at the present Rosebud agency.

6. The evidence fails to show (1) that any selections of land under and in accordance with the first paragraph of Art. 6 of the Treaty of 1868 was made by the heads of families; (2) that any certificates therefor were delivered as provided in the third paragraph of that article; or (3) that any occasion arose or existed by reason of any selections by heads of families for keeping a "land book," as described in said article, by the Indian agent. The record shows that all Sioux allotments, other than those to the members of the Santee Band on the Niobrara Reservation, were made under the provisions of the act of March 2, 1889, 25 Stat. 888–890, and that two hundred and five allotments were made to members of the Santee Band on their reservation in Nebraska under Art. 6 of the 1868 Treaty.

By act of July 15, 1870, 16 Stat. 335, 353, upon an estimate by the Secretary of the Treasury it was provided:

> For purchase of seeds and agricultural implements to be furnished the heads of families in lodges, six hundred, who desire to commence farming, as per eighth article treaty April twenty-ninth, eighteen hundred and sixty-eight, sixty thousand dollars."

By the act of March 3, 1871, 16 Stat. 544, 562, upon a similar estimate from the Secretary of the Treasury based upon an estimate furnished by the Secretary of the Interior, it was provided:

> For first of three instalments for purchase of seeds and implements to be furnished heads of families or lodges (say six hundred), fifteen thousand dollars.

By the act of June 22, 1874, 18 Stat. 146, upon an estimate from the Secretary of the Treasury based upon an estimate from the Secretary of the Interior, it was provided:

> For second of three instalments, for the purchase of seeds and agricultural implements, to be furnished to heads of families or lodges who shall engage in farming, as per eighth article treaty of April twenty-ninth, eighteen hundred and sixty-eight, fifteen thousand dollars.

By the act of March 3, 1875, 18 Stat. 420, 441, upon an estimate from the Secretary of the Treasury based upon an estimate from the Secretary of the Interior, it was provided:

> For last of three instalments, for the purchase of seeds and agricultural implements, to be furnished to heads of families or lodges who shall engage in farming, as per eighth article of treaty of April twenty-ninth, eighteen hundred and sixty-eight, four thousand dollars.

No other appropriations by Congress under Art. 8 of the Treaty of 1868 were made. Of the total appropriation of $94,000, the amount of $13,529.46 was expended by the Secretary of the Interior in the following amounts and for the purchases mentioned:

In the fiscal year 1874, $3,463 for wagons, fixtures, and agricultural implements at the Whetstone agency; $3,985 for wagons and fixtures at the Santee agency; $686.10 for agricultural implements at the Standing Rock agency; and $58.50 for agricultural implements at the Cheyenne River agency.

In the fiscal year 1875, the amount of $624.88 for transportation, etc., of supplies at the Whetstone agency; $2,700 for oxen at the Red Cloud agency; $1,861.98 for wagons, fixtures, and agricultural implements at the Red Cloud agency; and $150 for seeds for planting at the Spotted Tail agency.

The balance of $80,470.54 of the total appropriations of $94,000 during the four years mentioned was returned to surplus in the Treasury of the United States in the amounts of $76,470.54 on June 30, 1877, and $4,000 on June 30, 1878.

7. The annual report of the Commissioner of Indian Affairs for 1886 digests the Indian Agencies' reports of the number of Indian families "engaged in agriculture" on the 1868 reservation, as follows:

Agency	Number of Indian families engaged in agriculture	Page citation of annual report
Cheyenne River	624	412
Crow Creek and Lower Brulé	332	412
Pine Ridge	673	414
Rosebud	1,120	414
Standing Rock	1,134	414
Fort Peck	408	418
Santee and Flandreau	258	418
Total	4,549	

The facts do not show the nature or extent of farming operations by each of the families shown in the Commissioner's report as being engaged in agriculture, but a division of the total number of acres reported as being cultivated at the various agencies on the reservation by the number of families reported as "engaged in agriculture" at such agencies, shows that the families at the Cheyenne River Agency cultivated 2.16 acres; at Crow Creek and Lower Brulé, 4.71 acres; at Pine Ridge, 2.11 acres; at Rosebud, 3.74 acres; at Standing Rock, 2.95 acres; at Fort Peck, 1.39 acres; and at the Santee and Flandreau Agency, 20.30 acres, or an average at all the agencies of 3.58 acres. The record does not show how many of the 4,549 families shown in the Commissioner's report as being engaged in agricultural operations selected farms and in good faith indicated an intent to commence cultivating the soil for a living, nor how many of such number of families were furnished cows and oxen during the period from 1870 to 1880.

The court decided that the plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

Plaintiff computes the amount of its claim of $782,545.54 by multiplying $175, claimed to be the amount which the Government obligated itself to expend for seeds and agricultural implements for a period of four years, by 4,549, as the number of heads of families claimed upon the basis of the Indian Agencies' reports (finding 7) to have been engaged in agriculture in 1886, and deducts from the amount of $796,075 thus obtained the amount of $13,529.46 appropriated by the Government under Art. 8 and expended during the years from 1874 to June 30, 1878.

The claim involved in this proceeding is the same in principle as the claim disallowed by the Court in *The Sioux Tribe of Indians* v. *United States*, C–531–(5), 86 C. Cls. 299 (certiorari denied, 306 U. S. 642), which involved the alleged failure of the United States to fulfill its alleged obligation to furnish cows and oxen under Art. 10 of the treaty of 1868.

For the reasons therein stated as to the insufficiency of the evidence to show the number of heads of families who had selected lands, received certificates therefor, and as to whom the agent was satisfied intended, in good faith, to commence cultivating the soil for a living, the present petition must be dismissed.

Art. 8 of the treaty was not a continuing obligation of the Government, and we think a period of ten years over which the Secretary of the Interior held the appropriation, totalling $94,000 made by Congress, for the purpose of purchasing seeds and agricultural implements for those Indians who selected lands and in good faith commenced farming for a living was a reasonable period of time.

In addition to the fact that the evidence submitted is not sufficient to justify the conclusion that the United States has violated the provisions of Art. 8, we are of opinion that the plaintiff tribe cannot maintain suit and recover on this character of claim for the reason that it is not a tribal claim but concerns the rights of and obligations to individual Indians, members of the Sioux Tribe. *Price, et al.* v. *United States*, 174 U. S. 373, 375; *Blackfeather, et al.* v. *United States*, 37 C. Cls. 233, affirmed in *Blackfeather* v. *United States*, 190 U. S. 368, 374, 375, 378. The Jurisdictional Act of June 3, 1920, 41 Stat. 738, authorizes plaintiff to institute suit in this court only for amounts claimed to be due such tribe or band, or bands thereof, as tribal claims. The jurisdictional act does not give the court jurisdiction to hear and determine the legal and equitable claims of individual Indians. *Cherokee Nation* v. *United States*, 80 C. Cls. 1, 3, 4.

The petition is dismissed. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

Syllabus

GEORGE BEGGS, EXECUTOR OF THE ESTATE OF EDWARD D. FARMER, DECEASED, v. THE UNITED STATES

[No. 42509. Decided May 29, 1939]

On the Proofs

Estate tax; deduction of bequests to charity; intention of testator.—Where decedent directed that his residuary estate should "be divided and distributed and given to such charities and worthy objects" as his executor and his sister should determine, it is held that when the will is interpreted in the light of the testator's intentions, as expressed in the will and as gathered from surrounding facts and circumstances, the intention of the testator that his residuary estate should go to charity is adequately expressed in language sufficiently clear to comply with the provisions of Section 403 (a) (3) of the Revenue Act of 1921.

Same.—Where decedent, in his will, used the words "worthy objects" and "special friends," it is held that these words were used by decedent in connection with and in the same sense in which he directed that the net proceeds of his estate be divided and given to charities.

Same; statute not to be narrowly construed.—The provisions of the taxing statutes exempting from tax gifts and bequests to charity are begotten from motives of public policy and are not to be narrowly construed.

Same; power to select beneficiaries.—A gift for a charitable use, which is sufficiently definite and certain as to purpose, is not void for uncertainty as to beneficiaries, where the power to select the beneficiaries is given expressly or impliedly to the trustee or to other persons.

Same; bequests under will.—Where the estate went to charity under the authority of and pursuant to the terms of the will and not as a result of the absolute discretion of the executor, the value thereof was deductible from the gross estate.

Same; deduction of income.—Where the net income derived by the executor during administration became a part of the corpus of the residuary estate, the net proceeds of which were by the will bequeathed to charity and so distributed; and such income was by the terms of the will permanently set aside and destined for charitable purposes, it is held that such income was clearly deductible under Section 219 (b) (1) of the Revenue Act of 1926.

The Reporter's statement of the case:

Mr. Caesar L. Aiello and *Mr. G. Bowdoin Craighill* for the plaintiff. *Messrs. Frederic D. McKenney, John S. Flannery,* and *George Wharton Pepper* were on the brief.

Mr. Guy Patten, with whom was *Mr. Assistant Attorney General James W. Morris,* for the defendant. *Mr. Robert N. Anderson* and *Mr. Fred K. Dyer* were on the brief.

In this case the executor seeks to recover an estate tax of $109,577.74 paid November 2, 1927, and income taxes and interest totaling $19,175.23 for the years 1927 to 1931, inclusive. The only question is whether under the terms of his will the decedent left his residuary estate, about the amount and value of which there is no controversy, to religious, charitable, scientific, literary, or educational purposes.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff is a citizen of the United States, a resident of Fort Worth, Texas, and brings this suit as executor under the will of Edward D. Farmer.

2. Edward D. Farmer (hereinafter referred to as the decedent), a resident of Parker County, Texas, and a citizen of the United States, died May 29, 1924. He was English by birth and training. The decedent left a last will and testament dated April 25, 1923, a copy of which is attached to plaintiff's amended petition, marked Exhibit 1, and is incorporated herein by reference. Under that will, which was duly admitted to probate in Parker County, Texas, plaintiff was named as executor and he has duly qualified and is still acting in that capacity.

3. By decedent's will the executor was directed to sell all of decedent's property within five years after decedent's death and all of the net proceeds of the sale were directed to be distributed by the executor in accordance with "Item Fourth" of the will reading as follows:

> I devise and direct that all the net proceeds from the sale of my estate as herein provided shall under the

direction of my executor, with the advice of my said sister, Gertrude Farmer, be divided and distributed and given to such charities and worthy objects as they my executor and my sister shall determine, remembering, however, the City of Fort Worth, in Texas, the City of Vancouver in British Columbia, Parker County, in Texas, and England, places to which I have become attached. It is my intention to write to my said sister, indicating to her my special friends, charities and worthy objects, I may wish my executor with her advice to provide for, but all such provisions shall come out of my own estate, and not from the estate herein devised to her. I desire my executor to pay particular and careful attention to the advice of my said sister in the distribution of my estate, and to relieve her of all business worries pertaining thereto.

"Item Ninth" of the will provided:

> I further direct that should my executor, with the advice of my said sister, Gertrude Farmer, decide that they should give away any of my property in kind to any charity or for any purpose they may consider worthy, then they shall have the right to do so, and such property shall not be sold by my executor as herein directed.

By his will decedent intended, and during his lifetime so informed plaintiff, that the greater part of his estate should be distributed among institutions organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes and for public purposes.

4. November 27, 1925, plaintiff, as executor of the decedent's estate, filed a Federal estate tax return disclosing a gross estate of $1,718,934.60, deductions of $603,696.90, and a net estate for tax purposes of $1,115,237.70. No tax was computed or paid on the return as filed. The return contained the following notation:

> Under the will of Edward Disney Farmer, the residue of his estate is to be given to charity and worthy objects:

Thereafter, upon audit and review of the estate tax return, the Commissioner of Internal Revenue (hereinafter re-

ferred to as the Commissioner) determined the gross estate to be $1,971,930.02, the allowable deductions $404,615.52, and the net taxable estate $1,567,314.50, upon which he computed an estate tax of $109,577.74, and notified the plaintiff thereof by his thirty-day letter of January 14, 1927. Thereafter by a sixty-day letter of May 12, 1927, the Commissioner notified plaintiff of a deficiency in tax of the amount shown in his thirty-day letter, namely $109,577.74, which plaintiff paid upon demand and under protest November 2, 1927.

5. October 14, 1931, plaintiff filed a claim for refund of the estate tax which had been paid, as shown in finding 4, together with interest thereon, and assigned as grounds therefor, among others, that he was entitled to deductions from gross estate in the determination of the estate tax liability, as follows:

1. Contributions actually made from principal of the estate to charitable institutions up to the time the claim was filed, in the aggregate amount of $556,440.90, on the ground that the decedent devised and directed by his will that "all the net proceeds from the sale of my estate * * * shall * * * be divided and distributed and given to * * * charities and worthy objects";

2. Because the decedent's will authorized the executor "to give away any of my property in kind to any charity or for any purpose they [the executor and decedent's sister] may consider worthy";

3. In accordance with the provisions of chapter 25, Acts of the 41st Legislature of the State of Texas, approved May 23, 1929, the executor has agreed to pay the sum of $209,933.10 to the Board of Regents of the University of Texas and has actually paid the sum of $115,000. The amount so paid and agreed to be paid the University of Texas is deductible as (1) bequest to charity or as (2) a State inheritance tax.

The claim for refund was rejected by the Commissioner, October 29, 1931.

Reporter's Statement of the Case

6. The 41st Legislature of the State of Texas enacted S. B. 98, chapter 25, Laws of Texas, 1929, formally approved May 23, 1929, reading as follows:

AN ACT authorizing the Board of Regents of the University of Texas to accept and hold in trust for the University a gift from the Executor of the will of E. D. Farmer, Deceased, for the purpose of establishing an international scholarship fund; Appropriating to the University of Texas all inheritance taxes against the estate of E. D. Farmer, deceased; providing that the amount of said taxes may be paid directly to the Board of Regents of the University of Texas, to be held and administered by said Board of Regents of the University of Texas as a special fund to be known as the E. D. Farmer International Scholarship fund; and declaring an emergency—

Be it enacted by the Legislature of the State of Texas:

SECTION 1. That the Board of Regents of the University of Texas be, and they are hereby, authorized to accept and hold in trust for the University such sums of money as may be paid to them by the Executor of the will of E. D. Farmer, deceased, of Parker County, Texas, for the purposes designated in Section 4 of this Act.

SECTION 2. That all inheritance taxes to be assessed against the estate and legatee of E. D. Farmer, deceased, be, and they are hereby, appropriated to the University of Texas for the purposes shown in Section 4 of this Act.

SECTION 3. The Comptroller of Public Accounts is directed to appraise said estate forthwith and certify to the Board of Regents the largest amount that might be assessed as inheritance taxes. Said amount may be paid directly to the Board of Regents of the University of Texas in cash or approved securities, within the discretion of said Board of Regents, and upon such payment, any liability of said estate, the legatees and beneficiaries of the will of said E. D. Farmer, deceased, or the executor of said will, for inheritance taxes to the State of Texas is thereupon terminated. And the Board of Regents shall certify to the Tax Collector of Parker County that said taxes have been paid, and said certificate shall be then recorded by said Tax Collector and shall operate as a release of the State's lien upon inheritance taxes.

SECTION 4. The moneys so paid in discharge of said tax liability shall constitute and be part of a special fund to be known as "E. D. Farmer International Scholarship Fund." The fund shall be administered by the Board of Regents of the University of Texas, and they are hereby created trustees thereof. The income from said fund shall be used by said Board for the purpose of providing scholarships in the University of Texas to students from the Republic of Mexico, and providing scholarships in the National University of Mexico to students of the University of Texas. Within the discretion of the Board of Regents of the University of Texas, a portion of said income may be used at any time to further the exchange of instructors between the University of Texas and the said National University of Mexico. All such scholarships as may be provided by said income shall be competitive and the awards thereof shall be made in a manner to be determined by the Executor of the will of the said E. D. Farmer, deceased.

SECTION 5. The fact that by complying with this Act the said Executor will be making a substantial gift to the University of Texas largely in excess of the amount likely to be due the State under the law as inheritance taxes upon the distribution of the Estate and the importance of having said funds available to the University at the earliest possible date creates an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days be suspended, and the same is hereby suspended and this Act shall take effect and be in force from and after its passage, and it is so enacted.

Pursuant to the provisions of that statute plaintiff paid out of the proceeds of the sale of the corpus to the Board of Regents of the University of Texas cash in the sum of $115,000, and in addition thereto has tendered deeds of gift to that university covering certain parcels of real estate appraised in the estate tax return at $60,000. The latter gifts have been tendered to the State of Texas in full satisfaction of the balance due after making the cash payment of $115,000.

7. Since filing the claim for refund on October 14, 1931, plaintiff has made additional contributions to charitable, religious, and other institutions of that nature, and he now actually has distributed the entire corpus of the estate to tax

exempt institutions. The donees of the gifts made by plaintiff and the amounts paid to them, either in cash or real estate, are shown as follows:

Protestant Episcopal Church of the Diocese of Dallas, Texas	$475,000.00
County Judge of Parker County et al., Trustees, for the benefit of certain churches in Parker County. The Methodist College of Weatherford	105,305.60
Bishops of the Protestant Episcopal Churches in the Diocese of Texas, West Texas, and the Missionary District of North Texas	125,000.00
Harry T. Moore, Bishop, Protestant Episcopal Church, Diocese of Dallas, for the establishment of an institution to be known as the E. D. Farmer Memorial Home, for the care and maintenance of the aged and infirm of the white race in Texas	565,000.00
G. B. Strawn et al., Trustees, of the Endowment Fund of the Episcopate of the Diocese of Dallas, for the use and benefit of the Protestant Episcopal Church in the United States of America, in Diocese of Dallas, State of Texas	75,000.00
Tarrant County, Texas, for the use and benefit of the Tarrant County Orphans' Home, Fort Worth, Texas	7,500.00
City of Fort Worth, Texas, and Tarrant County, Texas jointly, for the use and benefit of the City-County Hospital, Fort Worth, Texas	62,500.00
Board of Regents, University of Texas, cash and real estate	175,000.00
County Judge of Stevens County and County Judge of Eastland County, for County Poor Farm of each County	125,523.90
Rochester Hadaway, Trustee, for various charities, as set forth in deed	48,286.46
	$1,764,115.96

The gifts from the corpus set out above total the sum of $1,764,115.96 out of a gross estate as determined by the Commissioner of $1,971,930.02. In his determination the Commissioner allowed deductions from the gross estate of $404,-615.52, and these deductions did not include any of the gifts set out in the above tabulation.

All of the gifts to the aforementioned donees were made for exclusively public purposes or to or for the use of corporations organized and operated exclusively for religious,

charitable, scientific, literary, or educational purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual or to the trustees exclusively for such religious, charitable, scientific, literary, or educational purposes.

8. March 10, 1928, plaintiff filed a Federal income tax return on behalf of decedent's estate for the calendar year 1927 disclosing a gross income for that year of $130,149.28, deductions of $18,501.42, a net income of $111,647.86, and an income tax due thereon of $12,603.20, which amount plaintiff paid in four equal installments of $3,150.80 on March 10, June 12, September 15, and December 13, 1928.

Included in the deductions taken by plaintiff in that return was an item of $4,288.75, such amount being the aggregate of amounts claimed to have been paid or permanently set aside, pursuant to the terms of the decedent's will exclusively for religious, charitable, scientific, literary, or educational purposes out of income received by plaintiff as executor in 1927. The amount of deductions so claimed to have been paid or set aside exclusively for such purposes has been voluntarily reduced by plaintiff to $3,965.70. Thereafter, on audit and review of plaintiff's income tax return for 1927, the Commissioner, among other things, disallowed the deduction claimed on account of contributions in the sum of $4,288.75, and on January 21, 1931, notified plaintiff of a deficiency of $3,713.96, which amount with interest in the sum of $688.91—that is, a total of $4,402.87—plaintiff paid May 5, 1931.

March 6, 1933, plaintiff duly filed a claim for refund of income tax on behalf of decedent's estate for 1927 in the amount of $4,402.87, on the ground that "the contributions * * * made in 1927 * * * were * * * exclusively for religious, charitable, or educational purposes and in pursuance of the authority given to the taxpayer by the terms of the last will and testament of the decedent."

May 10, 1933, the Commissioner notified plaintiff of his tentative disallowance of the claim for refund and gave the following reason for his action: "Since it appears that the will did not specifically provide for payment of contributions out of gross income of the estate, the amounts involved

are held to be charges against corpus instead of income," citing various rulings of the United States Board of Tax Appeals and Section 162 (a) of the Revenue Act of 1928. The claim for refund was finally rejected by the Commissioner on a schedule dated June 28, 1933.

9. March 14, 1929, plaintiff filed a Federal income tax return on behalf of decedent's estate for the calendar year 1928 disclosing a gross income for that year of $129,739.36, deductions aggregating $60,564.69, a net income of $69,174.67, and an income tax due thereon of $4,531.07, which amount plaintiff paid in installments as follows: $1,132.77 on March 14, June 14, and September 10, 1929, and $1,132.76 on December 14, 1929.

Included in the deductions taken by plaintiff in that return was an item of $7,705.91, such item being the aggregate of amounts claimed to have been paid or permanently set aside, pursuant to the terms of decedent's will, exclusively for religious, charitable, scientific, literary, or educational purposes out of income received by plaintiff as executor in 1928. The amount of these deductions so claimed to have been paid or set aside exclusively for such purposes has been voluntarily reduced by plaintiff to $7,519.36.

Thereafter, on audit and review of the income tax return for 1928, the Commissioner, among other things, disallowed the deduction on account of contributions in the sum of $7,705.91, and timely assessed an additional tax against plaintiff for that year of $13,461.57. February 17, 1931, plaintiff filed a waiver of his right to file a petition with the United States Board of Tax Appeals. April 7, 1931, plaintiff paid the additional tax of $13,461.57, together with interest thereon of $1,603.40, making a total of $15,064.97.

March 6, 1933, plaintiff as executor duly filed a claim for refund of income tax on behalf of decedent's estate for 1928 of $15,064.97, on the ground that "the contributions * * * made in 1928 * * * were * * * exclusively for religious, charitable, or educational purposes and in pursuance of the authority given to the taxpayer by the terms of the last will and testament of decedent." The Commissioner rejected the claim for refund on a schedule dated June 28, 1933.

Reporter's Statement of the Case

10. March 14, 1930, plaintiff filed a Federal income tax return on behalf of decedent's estate for the calendar year 1929 disclosing a gross income of $100,887.65, deductions aggregating $111,598.70, and no taxable net income. Included in the deductions taken by plaintiff in that return was an item of $21,598.70, such item being the aggregate of amounts claimed to have been paid or permanently set aside, pursuant to the terms of decedent's will, exclusively for religious, charitable, scientific, literary, or educational purposes and an item of $90,000 paid to the Board of Regents of the University of Texas, all out of income received by plaintiff as executor in 1929.

The amount of deductions claimed to have been paid or set aside exclusively for religious, charitable, scientific, literary, or educational purposes has been voluntarily reduced by plaintiff from $21,598.70 to $20,407.90. The item of $90,000 referred to above was paid out of corpus.

Thereafter, on audit and review of that return, the Commissioner disallowed the deductions set out above and notified plaintiff of the determination of a deficiency for 1929 of $17,233.51. December 2, 1932, plaintiff paid the additional tax, together with interest thereon of $2,671.19, making a total of $19,904.70.

March 6, 1933, plaintiff duly filed a claim for refund of income tax on behalf of decedent's estate for 1929 of $20,-007.54, on the ground that "the contributions * * * made in 1929 * * * were * * * exclusively for religious, charitable, or educational purposes and in pursuance of the authority given to the taxpayer by the terms of the last will and testament of the decedent." The Commissioner rejected the claim on a schedule dated June 28, 1933.

11. March 17, 1931, plaintiff filed a Federal income tax return on behalf of the decedent's estate for the calendar year 1930 disclosing a gross income for that year of $110,-772.35, deductions of $15,867.78, a net income of $94,904.57, and an income tax due thereon in the amount of $12,654.07, which amount plaintiff paid in installments as follows: $3,163.57 on March 16, and $3,163.50 on June 15, September 14, and December 14, 1931.

No deductions were taken by plaintiff in the return for 1930 for contributions claimed to have been made out of income for that year, since his claims on account of such deductions for previous years had been rejected. However, contributions in the sum of $28,378.03 were actually paid or set aside exclusively for religious, charitable, scientific, literary, or educational purposes out of income received by plaintiff in 1930.

March 6, 1933, plaintiff duly filed a claim for refund of income tax on behalf of decedent's estate for 1930 of $7,219.19 on the ground that he had made contributions out of income received during that year and that "the contributions * * * made in 1930 * * * were * * * exclusively for religious, charitable, or educational purposes and in pursuance of the authority given to the taxpayer by the terms of the last will and testament of the decedent." The Commissioner rejected the claim for refund on a schedule dated June 28, 1933.

12. March 12, 1932, plaintiff filed a Federal income tax return on behalf of the decedent's estate for the calendar year 1931 disclosing a gross income of $77,417.96, deductions aggregating $15,708.11, a net income of $61,709.85, and a tax due thereon of $4,602.51, which was paid in installments as follows: $1,150.65 on March 12 and $1,150.62 on June 15, September 14, and December 12, 1932.

No deductions were taken by plaintiff in that return on account of contributions claimed to have been made out of income for that year, since claims on account of such deductions for previous years had been rejected. However, contributions in the sum of $16,120.94 were actually paid or set aside in that year exclusively for religious, charitable, scientific, literary, or educational purposes out of income received by plaintiff in 1931.

March 4, 1933, plaintiff duly filed a claim for refund of income tax on behalf of decedent's estate for 1931, in which he asked for the refund of $3,267.75 on the ground that he had made contributions out of income received during that year and that "the contributions * * * made in 1931 * * * were * * * exclusively for religious,

charitable, or educational purposes and in pursuance of the authority given to the taxpayer by the terms of the last will and testament of the decedent." February 5, 1934, the Commissioner notified plaintiff that the claim for refund would be disallowed.

13. Edward D. Farmer, the decedent, and George Beggs, the executor of his estate and plaintiff in this proceeding, were lifelong friends, having been associated in business for over forty years. Since 1905 the latter managed all of decedent's property. The decedent was a bachelor, and by nature and intent very charitable, giving properties from time to time to many charitable causes. Numerous discussions and consultations were had between decedent and plaintiff regarding gifts to charities and in the later years of his life the decedent consulted plaintiff before making any large gifts to charity. This close association enabled plaintiff to become thoroughly familiar with the types of charities in which decedent was interested.

14. When the decedent executed his will of April 25, 1923, plaintiff was called to the office of the attorney who drew it and was given a copy for the purpose of digesting it and discussing the contents thereof with the decedent. Thereafter a discussion was had between decedent and plaintiff regarding the will and charitable institutions which were to receive his entire estate.

After making his will the decedent wrote a letter to his sister in England (see "Item Fourth" of the will, finding 3) indicating certain charitable objects for which he desired to provide. After the decedent's death plaintiff made several visits to England where he examined that letter and discussed its contents with the sister.

The gifts and contributions made by plaintiff as executor of the decedent's estate, both from corpus and income, were made in accordance with plaintiff's own best judgment in respect to what he thought would have conformed to the policy of the decedent and decedent's general ideas, as stated orally to plaintiff by the decedent in the latter's lifetime and as shown by the letter from the decedent to his sister.

15. All contributions and gifts now claimed as deductions from gross income for income-tax purposes, as hereinbefore

indicated, were made by plaintiff to and for the use of corporations, trusts, funds, and foundations organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

16. If the estate is entitled to recover the additional estate tax assessed and collected, it has likewise overpaid the income tax and interest due for the years 1927 to 1931, inclusive, which it is entitled to recover as follows:

1927	$1, 175. 82
1928	2, 078. 98
1929	5, 604. 47
1930	6, 741. 57
1931	3, 574. 89
Total	19, 175. 23

17. The decedent by item fourth of his will bequeathed and intended to bequeath the entire net proceeds of his residuary estate in the United States, including any interest or income therefrom, to charity or for charitable, educational, or religious objects. The term "special friends" used in the latter portion of the fourth item of the will did not, of itself, and was not intended by the decedent to enlarge, modify, or limit the preceding definite and certain bequests to charity and charitable objects, nor was it authority, without more, for the executor to give or distribute any part of the corpus, proceeds, or income to other than charitable objects. By clear language the term "special friends" had reference at most to an exception which the decedent, during his lifetime, might make to the definite and certain bequest to charities and directions to his executor to so distribute the entire estate. Rather than indicating a broad discretion in the executor, it shows the complete absence of discretionary or other authority unless subsequently specifically given by the decedent. In the letter written by the decedent to his sister subsequent to the execution of the will, only certain charities were mentioned. It is established and agreed that the decedent in referring to the cities of Fort Worth and Vancouver and to Parker

County, Texas, and England intended and had reference to charities and worthy objects in those places. By the term "worthy objects," the decedent intended objects of a charitable, educational, or religious character.

For many years prior to decedent's death, George Beggs, the executor herein, had been a close personal friend of the decedent, and the executor and the decedent's sister were in a position to know and were best qualified to judge as to the decedent's intentions as disclosed in conversations during his lifetime and in directions given in his will. In carrying out those intentions as they understood them, they distributed, as hereinbefore stated, the entire residuary estate, which included interest and income during the settlement and distribution, to charity. The additional estate tax and income tax herein sought to be recovered were paid by the executor out of the residuary estate. Had such tax not been collected, the amount thereof would also have been distributed to charity. The evidence shows and the executor certifies of record that the net recovery herein will, pursuant to the will, be distributed to charities of the class specified in section 403 (3) of the taxing act.

The amount of interest and income from the corpus of the residuary estate upon which the defendant required the executor to pay an income tax and interest totaling $19,175.23 for the years 1927 to 1931, inclusive, was a part of the residuary estate and under the provisions of the will was bequeathed, as was the corpus, to charity, and, like the corpus, was pursuant to the terms of the will distributable by the executor to charity.

The court decided that the plaintiff was entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

Section 403 (a) (3) of the Revenue Act of 1921, 42 Stat. 227, 279, in effect at the time of the decedent's death on May 29, 1924, provided that for the purpose of tax the value of the net estate should be determined by deducting from the value of the gross estate the amount of all bequests, legacies, devises, or transfers for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific,

literary, or educational purposes, or to a trustee or trustees exclusively for such purposes. The fourth item of decedent's will, the interpretation of which determines the question involved, was as follows:

> I devise and direct that all the net proceeds from the sale of my estate as herein provided shall under the direction of my executor, with the advice of my said sister Gertrude Farmer, be divided and distributed and given to such charities and worthy objects, as they, my executor and my sister, shall determine, remembering, however, the City of Fort Worth in Texas, the City of Vancouver in British Columbia, Parker County in Texas, and England, places to which I have become attached. It is my intention to write to my said sister, indicating to her any special friends, charities, and worthy objects I may wish my executor with her advice to provide for, but all such provisions shall come out of my own estate and not from the estate herein devised to her. I desire my executor to pay particular and careful attention to the advice of my said sister in the distribution of my estate, and to relieve her of all business worries pertaining thereto.

The ninth item of the will was the same as the fourth except that it authorized the executor, with the advice of decedent's sister, to give away any of his property in kind "to any charity or for any purpose they may consider worthy."

Counsel for defendant contend that no part of the residuary estate of the decedent was deductible from the gross estate for the reason that the amount bequeathed by decedent to charities was not definite and certain or definitely ascertainable at the time of his death, and that since the decedent in his will did not direct the payment of any amount out of income, or set up any trust, there is no authority for the deduction of amounts by the executor distributed to charities out of income. In other words, the defendant's contention with respect to the estate and income tax is that the provisions of the will are insufficient to show that the decedent intended that his residuary estate should go to charitable uses. We cannot agree. When the will is interpreted, as it must be in the light of the intention of the testator as expressed in the will and as gathered from surrounding facts and circumstances, we think the decedent

intended and sufficiently disclosed that intention in the directions to his executor and his sister that his residuary estate was being left and should go to charity and that this intention was adequately expressed in the fourth item of the will in language sufficiently clear to comply with the provisions of section 403 (a) (3) of the statute and to justify and require the deduction of the value of such residuary estate from the gross estate in determining the net estate subject to tax. The decedent made specific provision for his nephews, nieces, and sister, and no other specific bequests were made except to charity and worthy objects in the fourth item of the will. It is stipulated and agreed that all the corpus of the residuary estate was distributed to tax-exempt charitable or educational institutions. We think it is clear that this distribution to charities from the corpus and income of the estate was made pursuant to the terms of the will. The gift by decedent to charities is quite specific and we think it is clear that he directed that all his net residuary estate should be distributed and given to them. It is not important that the will did not specifically name the charities to which the estate should go, or the amount to which each charity should be entitled.

The defendant seeks to justify its contention that there was no definite and certain bequest to charity by pointing to the use by the decedent of the words "worthy objects" and "special friends" in the fourth item of the will. But it is clear, we think, that these words were used by the decedent in connection with and in the same sense in which he directed that the net proceeds of his estate be divided and given to "charities." The correctness of this interpretation is established by the fact that the decedent prior to his death did write a letter to his sister in England in which he indicated only certain "charitable objects" for which he desired her and the executor to make provision. In these circumstances it seems clear enough that the gifts to charity were pursuant to the terms of the will and not the result of the discretion of the executor as contended by the defendant. The executor's discretion and authority are derived from the terms of the will and we do not find in the will involved any grant of discretionary authority to the executor to dis-

tribute any part of the net proceeds of the estate to other than charities. The executor and the decedent's sister, who were in a position best to know and who did know the intentions and purposes of the decedent, carried out his intentions and purposes by distributing the entire residuary estate to charitable and educational institutions. The provisions of the taxing statutes exempting from tax gifts and bequests to charity are begotten from motives of public policy and are not to be narrowly construed. *Y. M. C. A.* v. *Davis*, 264 U. S. 47; *U. S.* v. *Provident Trust Co.*, 291 U. S. 272, 285; *Old Colony Trust Co.* v. *Commissioner of Internal Revenue*, 301 U. S. 379; *Brown* v. *Commissioner of Internal Revenue*, 50 Fed. (2d) 842; *St. Louis Union Trust Company* v. *Burnet*, 59 Fed. (2d) 922; *Helvering* v. *Bliss*, 293 U. S. 144. A gift for a charitable use, which is sufficiently definite and certain as to purpose, is not void for uncertainty as to beneficiaries, where the power to select the beneficiary is given expressly or impliedly to the trustee or to other persons. *Speer* v. *Colbert*, 200 U. S. 130; *Mississippi Valley Trust Co.* v. *Commissioner*, 72 Fed. (2) 197. Inasmuch as the estate here involved went to charity under the authority of and pursuant to the terms of the will and not as a result of the absolute discretion of the executor, the value thereof was deductible from the gross estate and the estate is entitled to recover the additional estate tax of $109,577.74 assessed and collected by the defendant.

In view of the foregoing conclusion that the value of the residuary estate was deductible from the gross estate as a bequest to charity, the estate was entitled to a deduction from gross income for the years 1927 to 1931, inclusive, of the income therefrom which, likewise, was distributed under the terms of the will to charities. Although the fourth item of the will did not specifically mention income from the residuary estate during administration and distribution, this was not necessary to the right of the executor under section 219 (b) (1) of the Revenue Act of 1926 (44 Stat. 9, 32) to deduct such income for income tax purposes. Section 219 (b) (1) is as follows:

> There shall be allowed as a deduction (in lieu of the deduction authorized by paragraph (10) of subdivision (a) of section 214) any part of the gross income,

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> without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in paragraph (10) of subdivision (a) of section 214, or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, or for the establishment, acquisition, maintenance, or operation of a public cemetery not operated for profit;

The income derived by the executor during administration became a part of the corpus of the residuary estate, the net proceeds of which we have held were by the will bequeathed to charity and so distributed. As such income was received it was by the terms of the will permanently set aside and destined for charitable uses. Such income was clearly deductible. In *Slocum et al.*, 6 B. T. A. 36, the United States Board of Tax Appeals held:

> We think it was the intent and purpose of Congress that income of an estate which, in following out the provision of a will, could be shown to be certainly destined for uses specified in paragraph (11) of subdivision (a) [charitable uses, etc.] of section 214 should be allowed as a deduction in computing the net income of the estate, * * *.

This decision was affirmed in *Bowers* v. *Slocum et al.*, 15 Fed. (2d) 400, 403, in which the court said that "The statute should be read, if possible, in such a way as to carry out this policy and not to make the result turn on accidental circumstances or legal technicalities." Affirmed 20 Fed. (2d) 350. See, also, *Hepburn* v. *Commissioner*, 8 B. T. A. 833.

It is stipulated that if, as a matter of law, plaintiff is entitled to recover, the overpayments of income tax and interest are $1,175.32 for 1927, $2,078.98 for 1928, $5,604.47 for 1929, $6,741.57 for 1930, and $3,574.89 for 1931, totaling $19,175.23. Judgment will therefore be entered in favor of the executor for $128,752.97 with interest as provided by law. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

BOHEMIAN BREWERIES, INC., FORMERLY INLAND PRODUCTS CO., v. THE UNITED STATES

[No. 42585. Decided May 29, 1939]

On the Proofs

Income tax; deduction for excise tax refunded as illegally collected.—Where in 1919 and 1920 plaintiff paid certain excise taxes on sweet apple cider pursuant to the regulations and the decisions of the Bureau of Internal Revenue then in effect, which excise taxes so paid were deducted by plaintiff from gross income in its income-tax return for said years; and where, before the plaintiff's tax liability for the said years had been finally determined by the Commissioner, it was judicially determined that the excise tax paid in 1919 and 1920 and deducted as aforesaid had not been imposed by the Revenue Act of 1918 and had therefore been illegally collected, and said excise tax was accordingly refunded to plaintiff, it is held that the Commissioner correctly held in his final determination of plaintiff's income-tax liability for 1919 and 1920 that since the excise tax paid was not due and had been refunded, the deductions which had been taken in the returns for 1919 and 1920 should not be allowed.

Same; duty of Commissioner.—So long as a case involving the audit and determination of the correct tax liability of a taxpayer is open and under consideration by the Commissioner of Internal Revenue, it is his duty to determine the income of the taxpayer and deductions to which the taxpayer is entitled.

Same; recovery barred by statute of limitations.—The conclusion that in the instant case the plaintiff cannot recover because of the exclusion of deductions previously allowed is not inconsistent with the rule that an amount deducted and allowed from income in a certain year must be included in income when collected or recovered in a subsequent year if the correction of the return and the tax liability in a prior year is barred by the statute of limitations.

Same; items and deductions in final determination of Commissioner.—Wherever it is possible to do so, the taxing statutes require that the items of income subject to tax and the deductions to which the taxpayer is legally entitled for the years under consideration be correctly and legally determined by the Commissioner in his final decision, notwithstanding such decision may be made several years after the returns for the particular years involved were filed.

Jurisdiction.—The Court of Claims has jurisdiction of the subject matter and the parties in the instant case.

The Reporter's statement of the case:

Mr. Clarence F. Rothenburg for the plaintiff. *Mr. Charles D. Hamel*, *Mr. John Enrietto*, and *Hamel*, *Park & Saunders* were on the brief.

Mr. J. H. Sheppard, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant. *Mr. Robert N. Anderson* and *Mr. Fred K. Dyar* were on the brief.

Plaintiff seeks to recover alleged overpayments of income and profits taxes of $5,017.63 for 1919, and $1,159.50 for 1920, totalling $6,177.13, with interest on the first-mentioned amount from August 27, 1929, and on the second amount from August 28, 1929.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff is a corporation of the State of Washington. It was originally organized under the name of Inland Products Company, but in 1933 its name was changed by appropriate amendment to Bohemian Breweries, Inc. During 1919 and 1920 the Inland Products Company was engaged in the manufacture and sale, among other products, of sweet apple cider.

2. March 15, 1920, the company filed its income and profits tax return for 1919 with the collector for the District of Washington, at Tacoma, Washington, in which it disclosed a tax of $8,699.25, which was paid to the collector in installments of $2,174.81 each on March 15, June 17, and September 18, 1920, and of $2,174.82 on December 18, 1920.

3. March 15, 1921, the company filed its income and profits tax return for 1920 with the collector at Tacoma, Washington, disclosing a tax of $614.01, which was paid in the amounts of $153.51 on March 15, 1921, and of $153.50 each on June 15, September 15, and December 15, 1921.

4. During 1919 and 1920 the Inland Products Company paid to the collector for the District of Washington excise taxes upon the manufacture and sale of sweet apple cider in the respective amounts of $14,841.12 and $9,604.79. These payments were made voluntarily without protest, without

separate notice and demand, threat, or duress by the collector.

5. In its income and profits tax returns for 1919 and 1920 the company deducted from its gross income the excise taxes paid during those years on the manufacture and sale of sweet apple cider, as aforesaid. Subsequently, in 1923, it was decided by the courts that the revenue acts involved did not impose a tax upon the manufacture and sale of sweet apple cider. *Monroe Cider, Vinegar & Fruit Company* v. *Riordan* (C. C. A. 2d), 280 Fed. 624; *Casey* v. *Sterling Cider Co.* (C. C. A. 1st) 294 Fed. 426.

6. December 31, 1923, plaintiff set up an account as part of its general ledger accounts entitled "Tax Refund Due," to which it charged $24,826.73, estimated to cover the cider-tax refund due to it, less 15% commission, and credited an account set up and entitled "Undivided Profit" with the amount of $24,826.73.

7. The latter account, "Undivided Profit," was then closed into the profit and loss account of plaintiff for 1923. The plaintiff sustained an operating loss, per books, of $13,370.73 for the calendar year 1923 after including the $24,826.73 in gross income. The aforesaid amount of $24,826.73 was included as part of plaintiff's gross income in its corporate income tax return for the calendar year 1923 which showed an excess of deductions over gross income of $13,434.80, and therefore a loss of that amount.

8. The total amounts of beverage taxes paid in 1919 and 1920 and deducted from income in those years were refunded to the company in 1924.

9. Upon receipt of the refund on August 26, 1924, plaintiff charged its cash account with $28,031.44 and credited the "Tax Refund Due" account with $28,031.44, described as "Refund by Govt." After minor adjustments, the account was closed at December 31, 1924.

10. Plaintiff's books show losses and gains for years subsequent to 1923 as follows:

1924 (loss)	$15, 230. 13
1925 (gain)	8, 921. 29
1926 (loss)	4, 904. 32

Inasmuch as plaintiff's income-tax returns for 1923 and 1924 showed losses and no taxable net income, no adjustment thereto was made by the Commissioner of Internal Revenue.

11. December 9, 1925, Inland Products Company filed a waiver extending to December 31, 1926, the time for assessment and collection of any additional income and profits taxes for 1919.

June 22, 1925, the Commissioner advised the Inland Products Company by a 60-day notice of certain adjustments in its tax for 1919 and 1920. The only adjustment material to this action was the disallowance by the Commissioner of the deduction theretofore taken on its returns for excise taxes paid on the manufacture and sale of sweet apple cider, which taxes had been subsequently refunded as aforesaid. This letter proposed deficiencies for 1919 and 1920 in the amounts of $5,364.86 and $1,016.19, respectively.

12. August 17, 1925, the Inland Products Company filed a petition in the United States Board of Tax Appeals for a redetermination of the deficiencies proposed by the Commissioner for 1919 and 1920, and the petition was heard June 22, 1927. On February 17, 1928, the Board entered its order of final determination sustaining the Commissioner's decision and approving the deficiencies.

13. Thereafter, on April 11, 1928, attorneys for Inland Products Company and the General Counsel of the Bureau of Internal Revenue as attorney for respondent entered into a written agreement as follows:

AGREEMENT FOR REVIEW BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

UNITED STATES BOARD OF TAX APPEALS

(Docket No. 6330)

INLAND PRODUCTS COMPANY, PETITIONER

v.

DAVID H. BLAIR, COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

It is hereby stipulated and agreed, by and between the parties to the above-entitled cause, by their respective attorneys, that the decision of the United States Board of Tax Appeals in said cause, dated February 17,

Reporter's Statement of the Case

1928, redetermining a deficiency in income and profits taxes against the above-named petitioner for the calander years 1919 and 1920, in the amounts of $5,364.86 and $1,016.19, respectively, may be reviewed by the United States Circuit Court of Appeals for the Fourth Circuit.

This agreement is made under and pursuant to the provisions of Section 1002 (d) of the Revenue Act of 1926.

CHARLES D. HAMEL,
R. S. DOYLE,
JOHN ENRIETTO,
Attorneys for Petitioner.
C. M. CHAREST,
Attorney for Respondent.

This agreement was filed with the Clerk of the United States Board of Tax Appeals on August 14, 1928.

Thereafter, on the same date, August 14, 1928, Inland Products Company filed a petition for review of the decision of the Board of Tax Appeals by the United States Circuit Court of Appeals for the Fourth Circuit. A copy of the record filed with the petition for review is attached to the stipulation as Exhibit A and by reference made a part hereof.

14. The United States Circuit Court of Appeals for the Fourth Circuit on April 9, 1929, 31 F. (2d) 867, affirmed the decision of the Board. No petition for a writ of certiorari was filed with the Supreme Court of the United States to review the decision of the Circuit Court of Appeals.

15. Deficiencies for 1919 and 1920 were assessed on August 10, 1929, in the amounts of $5,364.86 and $1,016.19, respectively, and pursuant to notice and demand were paid, together with interest thereon, by the company as follows:

Year	Deficiency	Interest	Date paid
1919	$5,364.86	$1,113.02	Aug. 27, 1929
1920	1,016.19	210.82	Aug. 28, 1929

16. February 19, 1931, plaintiff filed two claims for refund with the appropriate collector. Copies of these claims are in evidence as exhibits B and C, respectively, and by reference are made a part hereof.

December 3, 1931, the Commissioner advised the Inland Products Company as follows:

> Reference is made to your claim for refund of income taxes paid for the years 1919 and 1920.
>
> It is observed that the determination of a deficiency in the sums of $5,364.86 and $1,016.19, for the respective years 1919 and 1920, as shown in Bureau letter of June 22, 1925, was sustained by the United States Board of Tax Appeals, as reported in 10 B. T. A. 235, Docket 6330, January 26, 1928, and that the action of the Board was affirmed by the United States Circuit Court of Appeals for the Fourth Circuit, May 17, 1929. No petition for writ of certiorari to the United States Supreme Court was filed.
>
> In view of section 1003 (a) of the Revenue Act of 1926, which provides as follows:
>
> "The Circuit Courts of Appeals and the Court of Appeals of the District of Columbia shall have exclusive jurisdiction to review the decisions of the Board (except as provided in section 239 of the Judicial Code, as amended); and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 240 of the Judicial Code, as amended,"
>
> the decision of the United States Circuit Court of Appeals in this case has become final, which precludes the refund or credit of any portion of the taxes paid pursuant to the judgment of that court.
>
> Accordingly, your claims for refund will be rejected on the next schedule to be approved by the Commissioner.

The refund claims were rejected on a schedule dated January 15, 1932.

17. If plaintiff is lawfully entitled to a refund of income tax paid for 1919 and 1920 resulting from the exclusion as a deduction for those years of federal excise tax then paid and later held to have been illegally collected and refunded, the recovery in this proceeding would be $5,017.63 for 1919, and $1,159.50 for 1920 with interest as provided by law from August 27 and 28, 1929, respectively.

The court decided that the plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

Plaintiff seeks to recover the alleged overpayments of $5,017.63 for 1919 and $1,159.50 for 1920 on the ground that the Commissioner of Internal Revenue erroneously and illegally excluded as deductions in those years the amounts of $14,841.12 and $9,604.79, respectively, representing Federal excise tax paid in those years on sales by it of sweet apple cider which the Commissioner at that time had ruled was subject to the excise tax. Before the plaintiff's returns and its tax liability for the years 1919 and 1920 were finally audited and determined by the Commissioner and before the expiration of the statute of limitation under waivers that had been filed, the Circuit Courts of Appeals for the First Circuit and the Second Circuit, as shown in finding 5, had decided in 1923 that sweet apple cider was not subject to the excise tax and the Commissioner of Internal Revenue proceeded in 1924 to refund the excise taxes which had been paid by plaintiff in 1919 and 1920. After these decisions holding that the excise tax was not legally collectible, the Commissioner in his final audit and determination of plaintiff's returns and its income tax liabilities for 1919 and 1920 on June 22, 1925, eliminated the deductions which had been taken for the excise tax paid. The United States Board of Tax Appeals on appeal by plaintiff as *Inland Products Co.* v. *Commissioner of Internal Revenue*, 10 B. T. A. 235, 236, sustained the action of the Commissioner in excluding the excise tax as a deduction from gross income for 1919 and 1920. The parties stipulated for review of the decision of the Board of Tax Appeals by the U. S. Circuit Court of Appeals for the Fourth Circuit and, after hearing and consideration on the merits, that court affirmed the decision of the Board on April 9, 1929, 31 Fed. (2d) 867.

Plaintiff contends that under the decision in *Nash-Breyer Motor Company* v. *Burnet*, 283 U. S. 483, the decision of the

Circuit Court of Appeals for the Fourth Circuit was void for the reason that it did not have jurisdiction of the case since, under the decision in the *Motor Company case*, the Circuit Court of Appeals for the Ninth Circuit was the court to which the plaintiff should have taken its appeal and, therefore, this court has jurisdiction because the petition was filed with the Board of Tax Appeals under the Revenue Act of 1924. (43 Stat. 253.)

The defendant contends, first, that plaintiff's cause of action is *res adjudicata* for the reason that the Circuit Court of Appeals for the Fourth Circuit had jurisdiction of the subject matter and that by stipulation the parties submitted to the jurisdiction of that court with the court's consent; and, second, that in any event plaintiff is not entitled to recover on the merits for the reason that the decision and action of the Commissioner excluding in 1925 the excise tax as a deduction from gross income for 1919 and 1920 and the decisions of the Board of Tax Appeals and the Circuit Court of Appeals, affirming that action, were correct.

This court has jurisdiction of the subject matter and the parties. We need not discuss the question of whether plaintiff's cause of action is *res adjudicata* for we are of opinion, in any event, that the decisions of the Commissioner, the Board of Tax Appeals, and the Circuit Court of Appeals upon the question presented were correct and that plaintiff is not entitled to recover on the merits. The cases cited and relied upon by plaintiff are distinguishable upon the facts or upon principle. So long as a case involving the audit and determination of the correct tax liability of a taxpayer is open and under consideration by the Commissioner of Internal Revenue, it is his duty correctly to determine the income of the taxpayer and deductions to which the taxpayer is entitled. *Lewis* v. *Reynolds*, 284 U. S. 281; *Illinois Terminal Co.* v. *United States*, 73 C. Cls. 263, 53 Fed. (2d) 904. In 1919 and 1920 plaintiff paid certain Federal excise taxes on sweet apple cider pursuant to the regulations and the decisions of the Bureau of Internal Revenue then in effect. But before the plaintiff's tax liability for 1919 and 1920 was finally determined by the Commissioner it had been judicially

determined that the excise tax paid in 1919 and 1920 and deducted by plaintiff from gross income in its income-tax returns for those years had not been imposed by the Revenue Act of 1918 (40 Stat. 1057) and was illegally collected. Under these decisions plaintiff was not liable for the excise tax and the same was refunded. Accordingly, the Commissioner held in his final determination of plaintiff's income tax liability for 1919 and 1920 that since the excise tax paid was not due and since it had been refunded, the deductions which had been taken in the returns for 1919 and 1920 should not be allowed. The tax here sought to be recovered resulted entirely from the exclusion of the deductions of such excise tax for 1919 and 1920. This conclusion that plaintiff cannot recover because of the exclusion of these deductions is not inconsistent with the rule that an amount deducted and allowed from income in a certain year must be included in income when collected or recovered in a subsequent year when the correction of the return and the tax liability in a prior year is barred by the statute of limitation. That rule is justified by the fact that actually and for tax purposes the taxpayer has received a definite advantage and has actually received in the subsequent year income which was not included and subjected to tax in the prior year. Wherever it is possible to do so, the taxing statutes require that the items of income subject to tax and the deductions to which the taxpayer is legally entitled for the years under consideration be correctly and legally determined by the Commissioner in his final decision, notwithstanding such decision may be made several years after the returns for the particular years involved were filed. *Lewis* v. *Reynolds*, *supra*. The petition is dismissed. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

Syllabus

BLUE JAY LUMBER COMPANY AND DEL RIO LUMBER COMPANY v. THE UNITED STATES

[No. 42909. Decided May 29, 1939]

On the Proofs

Income tax; claim for refund reopened by Commissioner's action.—Where the Commissioner of Internal Revenue on January 26, 1929, on a supplemental schedule to the collector listed an overpayment by plaintiff of the income tax for the year 1922, which overpayment had previously been erroneously scheduled to a subsidiary of the plaintiff, it is held that by this action the Commissioner reopened and reconsidered the claim for refund filed by the plaintiff on April 13, 1927.

Same; credit for overpayment authorized only by reopening.—The credit of the overpayment for 1922 against the tax of the plaintiff for 1920 was made and authorized for the reason that plaintiff was the taxpayer, had actually paid the tax for 1922 and had filed a timely refund claim; the only authority by which the Commissioner could make the credit was to reopen the refund claim theretofore filed by plaintiff on April 13, 1927.

Same; second claim for refund.—This reopening also rendered effective the second claim filed by plaintiff on November 3, 1927.

Same; previous conclusion of Commissioner reversed.—This action also operated to reverse and vacate the previous conclusion of the Commissioner in his letter of December 22, 1928, and his rejection on January 18, 1929, pursuant to that letter, of the refund claim of November 3, 1927.

Same; account stated.—In his audit and determination thereafter made on September 28, 1929, the Commissioner rendered an account stated with respect to the tax of plaintiff for 1922.

Same; suit timely filed.—Where on January 26, 1929, prior to the determination and rendition of this statement of account to plaintiff, the claim for refund previously filed by plaintiff had been reopened by the Commissioner and was still open at the time the account was stated and reopened on September 28, 1929, it is held that the instant suit was timely instituted within six years thereafter.

Same; recovery limited.—Recovery is limited to the amount paid within four years of the filing of the claim for refund on April 13, 1927.

The Reporter's statement of the case:

Mr. Frederick L. Pearce for the plaintiffs. *Messrs. Morris, KixMiller & Baar* were on the brief.

Mr. Daniel F. Hickey, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant. *Mr. Robert N. Anderson* and *Mr. Fred K. Dyar* were on the brief.

The Blue Jay Lumber Company overpaid its income tax for 1922 in the amount of $6,628.65, and interest of $26.28, of which amount $3,315.74 was credited January 26, 1929, against the tax of that company for 1920 and the balance of the overpayment of $3,312.91 and interest of $26.28 has not been refunded or credited. The return of this balance of the overpayment was denied to the Blue Jay Lumber Company on the erroneous ground that the refund thereof was barred by the statute of limitation for the asserted reason that a timely claim for refund had not been filed by the Del Rio Lumber Company in whose name the tax had been erroneously assessed.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. The Blue Jay Lumber Company, hereinafter referred to as "Blue Jay," is a West Virginia corporation with principal office at Blue Jay, and the Del Rio Lumber Company, hereinafter referred to as "Del Rio," is a West Virginia corporation with principal office at Greensburg, Pennsylvania.

Blue Jay filed a tentative consolidated income tax return for 1922 with the collector at Parkersburg, West Virginia, on March 15, 1923, and at the same time delivered to the collector its check for $1,562.50, being one-fourth of the estimated tax shown on the tentative return. This tentative return included the income or losses of plaintiffs and three other affiliated corporations known as Lynwin Coal Company, Boswell Lumber Company, and Raleigh & Pocahontas Railroad Company. This return showed Blue Jay as the parent corporation. The business of all the corporations prior to

and during the taxable year 1922 was that of lumbering and coal mining. Under an extension of time properly secured, Blue Jay filed a final consolidated return for 1922 for itself and affiliated corporations with the collector on June 15, 1923, showing a total tax of $6,628.65. With the return Blue Jay delivered to the collector its check for $1,751.83, of which $1,750.41 was applied by the collector as payment on the tax disclosed by the return and $1.42 was applied as interest on such portion of the first installment of tax for 1922 as was then found by him to have been unpaid since March 15. At or before the time of filing the final return on June 15, 1923, an information return on Form 1122 designating Blue Jay as parent company of the consolidated group was filed for each of the affiliated corporations with the collector within whose district the principal office of each affiliated corporation was located. The information return for Del Rio was filed with the collector at Pittsburgh, Pa. These returns were all sent by the collectors to the Commissioner.

In preparing the final consolidated return for 1922, the name of Del Rio was inadvertently typed above that of Blue Jay on the list of names of the affiliated corporations appearing at the top of page 1 of the final consolidated return executed by Blue Jay.

2. Upon the filing of this return by Blue Jay and the payment of tax by it, the collector at Parkersburg prepared an erroneous assessment list of the tax shown on the final consolidated return for 1922 in the amount of $6,628.65 in the name of "Del Rio Lumber Company and Subsidiaries, Blue Jay, W. Va." This was a careless mistake. The collector knew, first, that Del Rio was not located at Blue Jay, W. Va.; that the return showed that it had no net income; that the return had been executed by Blue Jay; and, second, that the return had been filed and the tax paid by Blue Jay. Thereafter the Commissioner signed this erroneous assessment list. But such erroneous list did not thereafter preclude the collector and the Commissioner from applying the payments made by Blue Jay on its tax nor from refunding to Blue Jay any overpayment made by it, since an assessment is not necessary to a valid collection, refund, or credit.

The tax paid by Blue Jay was credited to it at the time paid, but later transferred to the erroneous assessment list, and an overpayment subsequently determined by the Commissioner was credited January 26, 1929, to a tax due by Blue Jay for 1920. But the refund of an overpayment subsequently determined in September 1929 by the Commissioner to have been made for 1922 by Blue Jay was erroneously and illegally refused under a refund claim timely filed by Blue Jay, and first rejected because the tax paid by Blue Jay had been assessed in the name of Del Rio. This claim had been reopened in January 1929.

None of the net income shown on the consolidated return was earned by Del Rio; this company had a net loss for 1922 which was stated in the return and no tax was paid by Del Rio for 1922. After the Commissioner had signed the erroneous assessment list in the name of Del Rio and returned it to the collector, the latter proceeded to credit the total tax of $6,628.65 and interest of $26.28 paid by Blue Jay in the amounts of $1,562.50 on March 15, 1923, and $1,751.83 on June 15, 1923, and $3,340.60 on December 24, 1923, to the assessment list so signed by the Commissioner for 1922 in the name of Del Rio.

3. The Commissioner made a preliminary audit March 14, 1927, of the consolidated return for 1922 filed by Blue Jay and wrote a letter to Blue Jay advising it of an overassessment of $3,805.91 and stating that "This overassessment, however, is tentative and is subject to revision upon final audit of your case." In this letter the Commissioner advised Blue Jay of the statute of limitation with reference to refunds and credits, and suggested the filing, by Blue Jay, of a claim for refund. On April 13, 1927, Blue Jay, as the parent corporation of the affiliated group, filed a claim for refund on the basis of the Commissioner's letter for $3,805.91, or such greater amount as might be legally refundable for 1922. The record does not specifically disclose the details of the Commissioner's preliminary audit on the basis of which he determined the proposed overassessment of $3,805.91, but the letter which he mailed to Blue Jay on March 14 was attached to the claim filed by that company. The Commissioner thereafter proceeded with his audit of

the tax liability or losses of plaintiff and its affiliated groups and on July 1, 1927, the Commissioner, although the Bureau of Internal Revenue then knew that plaintiff was the parent corporation of the affiliated group, perpetuated the error previously made of listing for assessment the tax due and paid by Blue Jay as the parent corporation of the affiliated group for 1922 in the name of Del Rio and advised Blue Jay in a letter addressed to it, of that date, as follows:

> Your claim for refund of $3,805.91, income tax for 1922, has been examined. The claim is based on Bureau letter dated March 14, 1927, directing your attention to an apparent overassessment for the consolidated group *of which your company was designated the parent or principal company*. It is found, however, that the assessment was made against the Del Rio Lumber Company and subsidiaries and the overassessment will be made the subject of a certificate of overassessment addressed to that company. The claim will, therefore, be rejected. The rejection of this claim will officially appear on the next schedule to be approved by the Commissioner. [Italics ours.]

This letter was the first information received by plaintiffs that the tax due and paid by Blue Jay had been assessed in the name of "Del Rio Lumber Company and Subsidiaries." Thereafter the claim of April 13, 1927, was listed on rejection schedule 9832 signed by the Commissioner July 14, 1927.

4. Thereafter on October 4, 1927, the Commissioner determined an overassessment of $3,315.74 and prepared and signed a schedule of overassessment and prepared a certificate of overassessment in the name of "Del Rio Lumber Company and Subsidiaries, c/o Blue Jay Lumber Co., Parkersburg, W. Va.", in the amount of $3,314.32, which was sent to the collector at Parkersburg, W. Va., for action by that official in accordance with instructions upon the schedule. On December 13, 1927, the Commissioner discovered that the amount of $1.42 also paid by Blue Jay had not been included in the overassessment schedule signed October 4, 1927, and, on that date, prepared and signed another overassessment schedule and another certificate of overassessment in the name of Del Rio for that amount. These

overassessments were scheduled under the provisions of section 284 (a), (b), (1) and (2), of the Revenue Act of 1926 after a preliminary audit of the tax liability of Blue Jay and subsidiaries for 1922.

5. In July 1927 Blue Jay and its affiliated corporations changed tax counsel. The successor counsel and attorney in fact was not informed until 1931 of the refund claim filed by Blue Jay April 13, 1927. In the meantime, on November 3, 1927, under his direction, a claim for refund, exhibit H, which is made a part hereof by reference, was prepared and filed for Blue Jay and the affiliated corporations for 1922 for refund of $6,877.23, being the total tax and interest paid for that year by Blue Jay.

Before any refund or credit, as hereinafter mentioned, had been made with respect to the above-mentioned overassessments for 1922, the Commissioner's office proceeded with a further audit and investigation of the tax liability of Blue Jay and its affiliated corporations for 1922 and on December 22, 1928, wrote a letter addressed to Blue Jay and its affiliated corporations and mailed the same to Blue Jay advising it of a further overpayment of $658.12 for 1922 but stating that refund thereof was barred for the asserted reason that the claim of November 3, 1927, for $6,877.23 was filed more than four years after the payment of the first two installments of the tax for 1922 and that, inasmuch as the last two installments of $3,315.74 paid December 24, 1923, had previously been scheduled as an overassessment, the claim of November 3, 1927, would be rejected. It was rejected on a schedule signed January 18, 1929. At that time Blue Jay's refund claim of April 13, 1927, had not been reopened.

6. At the time the above-mentioned letter of December 22, 1928, was written and mailed to Blue Jay, no part of the tax paid by it for 1922 had been refunded or credited although the overassessments hereinbefore mentioned, totalling $3,315.74, the amount of tax paid by Blue Jay on December 24, 1923, had been scheduled in the name of Del Rio. After such overassessment schedules and certificates of overassessment had been returned by the collector, but before refund checks drawn in the name of Del Rio had been mailed or

delivered to Del Rio, the collector and the Commissioner discovered that Blue Jay owed an additional tax for 1920. Thereupon the checks for the $3,315.74 were returned to the Commissioner's office by the collector and the same were canceled by the Treasurer and the amounts thereof were covered into the appropriation out of which they had been drawn. Thereafter the schedules of overassessment and the certificates of overassessment theretofore, in October and December 1927, prepared in the name of Del Rio were canceled and the overpayment was re-listed on supplemental schedules bearing the original schedule numbers, which new schedules and allowance for $3,314.32 and $1.42 were signed by the Commissioner January 26 and February 8, 1929, respectively, and mailed to the collector with instructions to credit the total of $3,315.74 shown thereon, against the additional tax due by Blue Jay for 1920. The collector did so and on January 30 and February 12, 1929, respectively, returned the new schedules to the Bureau of Internal Revenue. No interest was allowed or paid upon any portion of the total amount of $3,315.74 so allowed by the Commissioner as a credit on January 26 and February 8, 1929. No part of the amount of $3,312.91, tax paid for 1922 by Blue Jay on March 15 and June 15, 1923, has ever been refunded or credited to Blue Jay or any of the affiliated corporations.

7. On September 28, 1929, the Commissioner made a complete audit and determination of the returns and the tax liability of the Blue Jay Lumber Company and its affiliated corporations for the years 1921, 1922, and 1923. This was a detailed audit showing in various schedules the income and the tax liability of Blue Jay as the parent corporation and of its affiliated corporations. Preceding the various detailed schedules, this audit and determination stated in part as follows: "The bases of this audit are returns filed, revenue agents' reports on the Blue Jay Lumber Company and Lynwin Coal Company and information on file in this office. In the determination of the correct tax liability due consideration has been given the statements set forth in your claims for refund of $6,877.23 plus for the year 1922, filed November 3, 1927, and for the refund of $10,070.20 plus for the year 1923, filed November 3, 1927." In this audit and determina-

tion the Commissioner gave consideration and made a final determination and tax computation for 1922 for which year no tax liability was disclosed, but, instead, an overassessment of the total tax of $6,628.65; of this amount of overassessment the refund of $3,312.91 tax was shown in Schedule 14–A as being barred by the statute of limitation on the ground that no claim was filed within four years after payment of the tax. The statement of the account with reference to the tax liability of Blue Jay and its affiliated corporations and the total tax paid by Blue Jay for 1922 was stated in Schedules 14 and 14–A of this audit and determination for 1922, as follows:

Blue Jay Lumber Company, year ended December 31, 1922

SCHEDULE 14—CONSOLIDATED NET INCOME

Blue Jay Lumber Company (Schedule 8)		$48, 672. 95
Lynwin Coal Company (Schedule 10)		5, 411. 47
Total income		54, 084. 42
Losses:		
Boswell Lumber Company (Schedule 12)	$5, 466. 20	
Del Rio Lumber Company (Schedule 13)	2, 769. 68	
Total losses		8, 235. 88
Consolidated net operating income		45, 848. 54
Loss 1921, Schedule 7		127, 293. 06
Unabsorbed loss of 1921		81, 444. 52
Taxable net income		None

SCHEDULE 14-A—COMPUTATION OF TAX

Taxable net income (Schedule 14)		None
Correct tax		None
Tax previously assessed:		
June 40155		$6, 628. 65
Overassessment		6, 628. 65
Previously allowed:		
September 24, 1927	$3, 314. 32	
December 5, 1927	1. 42	
		3, 315. 74
Net Overassessment		3, 312. 91

Barred by Statute of Limitations.
Claim not filed within four years after payment of the tax.

The audit and determination of the Commissioner for the years 1921, 1922, and 1923, including the statement of the tax account of Blue Jay for 1922, as above, was mailed by the Commissioner to and received by Blue Jay, through its counsel and attorney in fact, September 28, 1929. This suit was instituted within six years thereafter.

The statement following the above-mentioned statement of account for 1922 that the overpayment of $3,312.91 was barred by the statute of limitation because no claim had been filed within four years after payment was, in part, erroneous. As a matter of fact and law, the decisions and actions of the Commissioner on January 26 and February 8, 1929, in recalling and canceling the schedules of overassessments in the name of Del Rio of an overpayment of $3,315.74 for 1922 and the issuance of new schedules therefor on those dates and the crediting of that amount to the tax of Blue Jay for 1920 constituted a reopening and reconsideration by the Commissioner of the refund claims theretofore filed by Blue Jay for 1922 on April 13 and November 3, 1927.

8. Subsequent to the rendition and delivery to plaintiff of the statement of account with respect to the tax liability for 1922, as set forth in finding 7, plaintiff's counsel wrote the Commissioner certain letters acquiescing in and accepting the account stated on September 28, 1929, and requesting him to refund the overpayment of $3,312.91 and interest of $26.28 under the claims for refund theretofore filed and also filed a petition for reconsideration of the action in holding that the refund could not be made because of the statute of limitation, which request the Commissioner refused on September 25, 1931, January 31, 1933, and on November 2, 1934.

The court decided that the plaintiff was entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The controlling facts in this case are simple, but a detailed explanation of all that occurred between the Commissioner of Internal Revenue and the Blue Jay Lumber Company is somewhat confusing by reason of the fact that the Commissioner in June 1923 erroneously assessed the tax due and paid by Blue Jay in the name of a subsidiary corporation

known as the Del Rio Lumber Company, which had no taxable income and paid no tax for 1922.

The pertinent facts are that on March 15, 1923, Blue Jay, the parent corporation of an affiliated group, filed a tentative consolidated return for 1922, at which time it paid an estimated first installment of tax of $1,562.50. The Del Rio Company, one of the plaintiffs herein, and three other affiliated corporations were included in this return as subsidiaries of Blue Jay. Under an extension of time duly obtained, Blue Jay Lumber Company on June 15, 1923, filed a complete and final consolidated return for 1922 showing a total tax of $6,628.65 and, on that date, Blue Jay, by its check, paid the collector $1,750.42, plus interest of $1.42 on a portion of the amount of the first installment which had not been paid on March 15, 1923. The balance of $3,315.74, plus interest of $24.86 overdue on the third and fourth installments, was paid by Blue Jay December 24, 1923. Inadvertently the name of Del Rio was entered on the final consolidated return ahead of the name of Blue Jay, the parent corporation. Although the collector knew that Blue Jay was the parent corporation and that it had paid the total tax, he prepared an erroneous assessment list which he sent to the Commissioner listing the entire tax due and paid by Blue Jay in the name of Del Rio, a subsidiary, which had a loss rather than a net income and had paid no tax. This assessment list erroneously prepared by the collector in the name of Del Rio was thereafter signed by the Commissioner. But the Bureau of Internal Revenue knew, as shown by the letter of March 14, 1927, that Blue Jay was the parent corporation.

April 13, 1927, Blue Jay, which had paid the tax, filed a claim for refund on the ground indicated in a letter from the Commissioner of Internal Revenue showing an overassessment of $3,805.91 for 1922. The claim so filed on the basis of the Commissioner's letter of March 14, 1927, was for $3,805.91 and "such greater amount as might be legally refundable." Thereafter, on July 1, 1927, the Commissioner, by the assistant to the Commissioner, notwithstanding the fact that Blue Jay had paid the tax and that it was then known to be the parent corporation of the consolidated

group, rejected this claim filed by Blue Jay on the erroneous ground that, the assessment having been made in the name of Del Rio, the overassessment and refund would have to be made to Del Rio; this, of course, was not correct, since Del Rio was not a taxpayer and had paid no tax. But the Commissioner's office proceeded, and on October 4, 1927, it prepared and sent to the collector a schedule of overassessment for 1922 in the amount of $3,315.74 in the name of Del Rio. On November 3, 1927, Blue Jay filed a second claim for refund for 1922 for $6,877.23, the total tax and interest paid, on the ground that losses for 1921 exceeded the net income for 1922. In the meantime the Commissioner had transmitted to the collector the schedule of overassessment in the name of Del Rio for $3,315.74 of the tax due and paid by Blue Jay for 1922. The collector appears to have returned the schedule showing the overassessment as an overpayment. About December 22, 1928, before a refund check for $3,315.74 and a certificate of overassessment prepared in the name of Del Rio were delivered, the collector and the Commissioner discovered that the Blue Jay Lumber Company, who had paid the entire tax of $6,628.65 and interest of $26.28 for 1922, owed an additional tax for 1920. Thereupon, the collector returned the Treasury check to the Commissioner and the amount thereof was returned to the Treasurer and covered into the appropriation in the Treasury out of which it had been drawn. Thereafter, on January 26 and February 8, 1929, the overpayment theretofore scheduled to Del Rio was relisted on a supplemental schedule to the collector and credited, by that official under instructions, to the outstanding unpaid tax of Blue Jay for 1920. The collector on January 30 and February 12, 1929, returned to the Commissioner his certificates that he had credited such overpayment for 1922 against the tax of Blue Jay for 1920. By this action the Commissioner in fact and in law reopened and reconsidered the claim for refund filed by Blue Jay on April 13, 1927, and the credit of the overpayment against the tax of the Blue Jay Lumber Company for 1920 at that time was made and authorized for the reason that Blue Jay was the taxpayer, had actually paid the tax for 1922, and had filed a

timely refund claim. The credit of $3,315.74 of the tax overpaid by Blue Jay for 1922 against the tax due by that company for 1920 was made more than five years after the amount had been paid, and the only authority by which the Commissioner could make the credit was to reopen the refund claim theretofore filed by Blue Jay on April 13, 1927. This reopening also rendered effective the second claim filed by that company on November 3, 1927. This action of January 26, 1929, also operated to reverse and vacate the previous conclusion of the Commissioner in his letter of December 22, 1928, finding 5, and his rejection on January 18, 1929, pursuant to that letter, of the refund claim of November 3, 1927.

In his audit and determination thereafter made on September 28, 1929, which was mailed to and received by Blue Jay through its attorney in fact, the Commissioner rendered an account stated with respect to the tax of Blue Jay for 1922 showing a balance of tax due, against which there were no offsets or credits, of $3,312.91. On January 26, 1929, prior to the determination and rendition of this statement of account to plaintiff, the claim for refund previously filed by Blue Jay had been reopened by the Commissioner and was still open at the time the account was stated and rendered on September 28, 1929. This suit was instituted within six years thereafter. But plaintiff can recover only $1,776.69 of the total balance shown to be due by the statement of account for the reason that the remainder of the balance shown due was paid on March 15, 1923, more than four years prior to the filing of the claim for refund on April 13, 1927. Plaintiff is therefore entitled to recover. *Toland* v. *Sprague*, 12 Pet. 300, 335; *Shipley Construction & Supply Co.* v. *United States*, 79 C. Cls. 736–743; *Wood* v. *United States*, 85 C. Cls. 258, 19 F. Supp. 254; *Clifton Mfg. Co.* v. *United States*, 85 C. Cls. 525, 19 F. Supp. 723.

Judgment will be entered in favor of plaintiff, the Blue Jay Lumber Company, for $1,776.69 with interest as provided by law. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

OLIVER T. FRANCIS v. THE UNITED STATES

[No. 42952. Decided May 29, 1939]

On the Proofs

Rental allowance, Captain in U. S. Marine Corps.—Where Captain in the U. S. Marine Corps, without dependents, stationed in China, not on field duty, was furnished with only one room, and was put to extra expense for heat and bath, it is held that he is entitled to recover for the failure to furnish quarters to which he was entitled and for reimbursement for all monies expended which in his judgment it was essential to expend.

Same.—Rental allowances are intended to reimburse an officer for money expended when he is not furnished quarters and provides his own.

Same.—Where an officer is furnished and occupies one room when entitled to three rooms, he cannot recover for the one room occupied; he is not entitled to the full rental allowance.

Same.—The Court's decisions in *Beery* v. *U. S.*, 87 C. Cls. 557; *Byrne* v. *U. S.*, 87 C. Cls. 241, and *Coleman* v. *U. S.*, 86 C. Cls. 752, are adhered to.

The Reporter's statement of the case:

Mr. Fred W. Shields for plaintiff. *King & King* were on the briefs.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant.

The court made special findings of fact as follows:

1. The plaintiff is an officer of the United States Marine Corps, and at all times hereinafter mentioned held the rank of Captain on the active list.

2. On April 19, 1930, while stationed at the United States Naval Station, Guam, he received orders issued by the Commandant of the United States Naval Station, Guam, on April 18, 1930, advising him that pursuant to instructions received from the Commander in Chief of the Asiatic Fleet he was detached from duty, United States Naval Station, Guam, and from any other duties that might have been assigned to him, and was to proceed to Shanghai, China, taking passage on the U. S. S. *Henderson* leaving Guam on

or about April 22, 1930, and on arrival in Shanghai, China, would report to the Commanding Officer, 4th Regiment of Marines, for assignment to duty as Communications Officer.

3. Pursuant to these orders, plaintiff on April 23, 1930, sailed for Shanghai, China, aboard the U. S. S. *Henderson* and arrived in Shanghai, China, on May 9, 1930.

4. On May 10, 1930, he joined Headquarters Company, 4th Marines, and was assigned duty in Shanghai, China, as Communications Officer for the 4th Marines. He remained on duty in Shanghai, China, until December 11, 1931, when he was detached from further duty there, and on December 15, 1931, sailed for the United States on the U. S. S. *Henderson*.

5. During the period from May 10, 1930, to December 11, 1931, while plaintiff was stationed at Shanghai, China, he first was furnished and occupied as quarters a single room in a building located at No. 2 Pacific Gardens, Shanghai, China, which building had been leased by the United States. The room was heated only by a fireplace and was so cold that after seven months he moved to a smaller room in the same building that contained an electric heater. Neither of the rooms occupied by plaintiff contained any furniture other than an iron bunk, and during the time plaintiff occupied them he rented furniture from a local Chinese dealer, paying $4 or $5 Mexican currency a month for it. The building contained only one bathroom for the use of five or six officers living in the building. These officers hired a Chinese boy to build fires in their rooms and heat water for the bath, plaintiff paying about $15, Mexican currency, per month as his share of the boy's wages. While stationed at Shanghai, China, plaintiff joined a private club known as the French Club, paying dues of about $5, Mexican currency, per month, and used the facilities provided by the club for bathing and the entertainment of friends.

6. The Government lease on No. 2 Pacific Gardens expired while plaintiff was living there, and during the last five months of his tour of duty in Shanghai, China, he was provided and occupied a room in another building leased by the Government in the same vicinity, known as the Of-

ficers' Club. The room was similar in all material respects to the room furnished plaintiff in the building at No. 2 Pacific Gardens and was occupied by him under the same conditions.

7. During the period from May 10, 1930, to December 11, 1931, while plaintiff was stationed at Shanghai, China, the duty performed by him was service under orders with troops operating against no enemy, actual or potential, and was not considered by the Navy Department to be "field duty."

8. Plaintiff is entitled to rental allowance for the period from May 10, 1930, to December 11, 1931, while stationed at Shanghai, China, in the sum of $953.33.

The court decided that the plaintiff was entitled to recover.

BOOTH, *Chief Justice*, delivered the opinion of the court:

The plaintiff is an officer of the U. S. Marine Corps, holding the rank of Captain. The suit is for the rental allowance of a bachelor, without dependents, of his rank and grade from May 10, 1930, to December 11, 1931.

The facts are as follows: On May 10, 1930, plaintiff, under competent orders, reported for active duty with the Fourth Brigade, U. S. Marine Corps, then stationed at Shanghai, China, and remained on duty until detached therefrom on December 11, 1931. During this period plaintiff was furnished and occupied as quarters a single room in a building leased by the United States.

The room was not exceedingly comfortable; it was heated by a fireplace, and seven months later the plaintiff moved to and occupied a smaller room in the same building heated by an electric heater. Neither of the rooms was adequately furnished, and the plaintiff at his own expense rented some furniture from a local Chinese dealer.

Five or six officers beside the plaintiff occupied quarters in the building which contained one bathroom. These officers joined with the plaintiff in employing a Chinese boy to build fires in their rooms and heat water for baths. The Government lease of the first building expired while plaintiff was occupying the room mentioned, whereupon during the last

five months of his tour of duty he was provided and occupied a room in another building leased by the Government which was in all material respects similar to the first room occupied by plaintiff.

Plaintiff predicates a right to judgment on Section 6 of the act of June 10, 1922, as amended by Section 2 of the act of May 31, 1924 (43 Stat. 250, 251). We do not need to set forth the statute, for the defendant concedes that plaintiff under the same is entitled to rental allowance. What the defendant insists upon is that under the statute and the decisions of this court the plaintiff is only entitled to receive $40 per month for the two additional rooms to which he was entitled under the law, plus the sums he expended during the period when he occupied the rooms assigned to him, i. e., $50 per month, making a total of $953.33.

The following cases are cited by the defendant: *Beery* v. *United States*, 87 C. Cls. 557; *Byrne* v. *United States*, 87 C. Cls. 241; and *Coleman* v. *United States*, 86 C. Cls. 752.

It has been the consistent holding of the court, and the cited cases disclose it, that rental allowances are intended to reimburse an officer for money expended when he is not furnished quarters and provides his own. We have also held that where an officer is furnished and occupies one room when entitled to three rooms, he cannot recover for the one room occupied. In other words, he is not entitled to the full rental allowance.

The plaintiff concedes that the cases cited by defendant are apropos. The challenge goes to their correctness, supported by a statement that they overrule or partially overrule a long line of earlier decisions involving an officer's right to rental allowances under the provisions of the statute involved.

Plaintiff does not cite in the brief the cases overruled. Apparently an argument is advanced that the case of *Lee* v. *United States*, 84 C. Cls. 629, sustains plaintiff's case. With this contention we are unable to agree. In the *Lee case* the officer occupied a canvas tent part of the time, and the Secretary of War determined that a canvas tent did not constitute adequate quarters. In this case no such determination

Syllabus

was made. The defendant furnished the quarters, and the plaintiff occupied them; true, they were not elaborate, but plaintiff was saved the expense of procuring others, and under the statute he receives full reimbursement for all monies expended which in his judgment it was essential to expend, and in addition a judgment for the defendant's failure to furnish him the quarters the law entitled him to receive. We adhere to our former decisions. Plaintiff is entitled to a judgment for $953.33. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and GREEN, *Judge*, concur.

G. SCHWARTZ AND COMPANY v. THE UNITED STATES

[No. 43096. Decided May 29, 1939]

On the Proofs

Government contract; salvage value of buildings demolished.—Where contractor in his bid for erection of a post office made a deduction for the salvage value to him of the buildings on the site and where under the order of the court in condemnation proceedings said buildings were awarded to the owners thereof, and by them removed, it is held that the failure of the Government to deliver the buildings for demolition and removal was a breach of the contract and the contractor is entitled to recover for the fair salvage value of the structures.

Same; delay by Government.—Where contractor was delayed in the completion of the work by the defendant, and put to extra expense, the rule is well settled that the Government is liable.

Same; removal of debris.—Where contractor was put to expense for removal of plaster and debris from the site, left in the cellars of the buildings demolished and removed by the owners, it is held that there can be no recovery since contractor was required by the specifications to remove all rubbish and debris; the situation is not changed by the fact that the owners, rather than the contractor, demolished and removed the buildings.

The Reporter's statement of the case:

Mr. Dean Hill Stanley for the plaintiff. *Tilson, Stanley & McCuen* were on the brief.

Mr. William A. Stern, II, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant.

The court made special findings of fact as follows:

1. The plaintiff is a corporation duly organized in 1915 under the laws of the State of Minnesota, with its principal place of business in Rochester, Minnesota.

2. On November 16, 1932, defendant advertised for sealed bids to be publicly opened in the office of the Supervising Architect in Washington, D. C., on December 21, 1932, for the furnishing of labor and materials and performing all work for the construction (except elevator and dumb waiter) of the United States Post Office at Rochester, Minnesota, on Block 29 in that city. A copy of the advertisement referred to is plaintiff's exhibit 1. All exhibits herein referred to are made a part of these Findings by reference.

3. As a prospective bidder, plaintiff received from the Supervising Architect the specifications and drawings for the proposed Post Office building. The specifications are plaintiff's exhibit 2. Paragraphs 1, 2, 3, 4, 5, and 6 of Section No. 2 (A) of the specifications provided as follows:

DEMOLITION

1. SCOPE.—The work to be done under this section of the specification requires the demolition and removal of all existing buildings now on the site, located approximately where indicated on Drawing No. C–M–1.

2. Bidders should examine the premises or the site of the work and inform themselves as to its character and the type of structures to be removed. Failure to take this precaution will not relieve the successful bidder from the necessity of furnishing all material and labor necessary to complete the contract without additional cost to the Government.

3. The contractor shall take the site as he finds it and shall remove all old structures within the lot lines. This work shall include the removal of interior walls, piers, partitions, chimneys, stairs, etc., in old basements or cellars. Exterior walls of basements, cellars, or other excavations below grade that act as retaining walls, and all walks, paving or floor slabs on earth, will be removed as specified under excavation, filling, and grading.

4. Common brick and framing lumber taken from old structures may be reused by the contractor in the new construction provided they are suitable and comply with the contract requirements. All other material removed shall become the property of the contractor and shall be taken from the premises as the storage of such old materials or equipment on the site will not be permitted.

5. Bidders shall take into account the salvage value to them of materials removed, and such value shall be reflected in the bids.

6. All rubbish and debris found on the site and resulting from the work of demolition shall be removed from the premises, and such removal shall include the clearing of basements, cellars, and similar excavations. The streets and sidewalks adjacent to the premises shall be kept in a neat and clean condition.

4. On December 19, 1932, plaintiff submitted to the Supervising Architect of the Treasury four bids to erect the Post Office building, of which only bid No. 3 is material to this case. By bid No. 3, plaintiff offered to construct the Post Office building in accordance with the specifications and drawings for $179,000.

Prior to the opening of the bids and on December 21, 1932, plaintiff telegraphed to the Supervising Architect to deduct from bid No. 3 the sum of $15,500, making bid No. 3 for the sum of $163,500.

5. Between the time of advertising for bids and the time of opening the bids, there were ten buildings located on the aforesaid Block 29. Before plaintiff's bid was sent in, Garfield Schwartz, president of the plaintiff, appraised all the buildings on Block 29 and determined the salvage value of each building to plaintiff in order that such values might be

deducted from the bids which plaintiff proposed to make. The values were as follows:

Florence Hotel	$4,400
Florence Hotel Annex	400
Ben Yates' Building	1,800
Mrs. Herrick's Building	350
Mrs. Herrick's Smaller Building	200
Mr. Hutchins' House	400
E. Hoffman's House	150
Mr. Schultz's House	450
Mrs. Posz's Larger House	400
Mrs. Posz's Smaller House	50
Total	8,600

The first and third buildings above, plaintiff intended to move on other lots in the city. The other buildings were to be demolished. The sum of $8,600 was reflected in each of plaintiff's bids, which was a fair and reasonable amount to deduct.

6. By letter of February 3, 1933, defendant accepted plaintiff's bid No. 3 dated December 19, 1932, as modified by the telegram dated December 21, 1932, in the amount of $163,500 for the construction of the Post Office in strict accordance with the specifications. The contract for the construction of the Post Office building was entered into February 3, 1933. The contract is plaintiff's exhibit 7.

On April 5, 1933, plaintiff received notice to proceed with the work, and work was begun by plaintiff on April 8, 1933. The contract provided that the building was to be completed within 420 calendar days after the date of receipt of notice to proceed.

7. On or about February 4, 1932, defendant began proceedings in the United States District Court for the condemnation of Block 29 in Rochester, Minnesota, for the purpose of using the same for the site of the Post Office building. On February 2, 1933, an order was entered by the Court awarding all the buildings on Block 29 to their several owners and providing that the owners should remove the buildings on or before February 15, 1933. On March

23, 1933, the Court entered its order granting possession of Block 29 to the defendant and the ownership of any buildings remaining thereon.

Plaintiff had no notice either of the proceedings leading to the aforesaid order of February 2, 1933, or of the entering of such order.

8. Sometime in January 1933 some of the former owners began to demolish buildings on Block 29. In January 1933, and prior to the acceptance of plaintiff's bid on February 3, 1933, plaintiff had learned that demolition of buildings on Block 29 was in progress. Before work was commenced on April 8, 1933, all the buildings on Block 29 had been demolished by their former owners except the building referred to in the next finding.

9. On April 15, 1933, plaintiff wrote a letter to Helen Posz which reads as follows:

> We are going to begin on the excavating for the Post Office on Monday, April 17th, and one of the first things we intend to do is to fill up the old basements. Therefore it is going to be necessary for you to have your residence entirely removed from the site by Tuesday night, April 18th, and the basement must be kept clean and not filled up with old plaster and debris, as in doing the refilling we must use dirt. We trust that you will arrange to get a crew of men on this work and get it entirely cleaned up by Tuesday night, as we must take over the premises Wednesday morning.

10. On April 10, 1933, plaintiff addressed a letter to the Supervising Architect in regard to the structures that were on Block 29 at the time its bids were submitted and asked for the Supervising Architect's interpretation of specification section 2 (A), referred to in finding 3 herein. Having received no answer to the foregoing letter, plaintiff on May 20, 1933, wrote another letter to the Supervising Architect, the second paragraph of which reads as follows:

> Therefore, as the specification provides that these buildings were to become the property of the contractors and that the salvage value of them was to be reflected in the bid, we are herewith filing claim for Eight Thousand Six Hundred Dollars ($8,600.00), this being the amount which we deducted from our bid and allowed the government for these buildings.

11. On June 5, 1933, defendant wrote to plaintiff as follows:

> Referring to your letters of April 10th and May 20th, relative to your claim of $8,600.00 for the omission of the demolition work of your contract which, as you state, reflected a credit of $8,600.00 in your bid, you are advised that before consideration can be given to your claim it will be necessary for you to forward through the Construction Engineer an itemization of this claim properly attested showing how the total amount was obtained.

On June 20, 1933, plaintiff submitted to the Construction Engineer by letter an itemization of its claim for $8,600. No part of the $8,600 has been paid to plaintiff.

12. There was a large quantity of plaster and debris left in the cellars of the buildings demolished on the Post Office site, which plaintiff had to remove. The reasonable compensation for such service was $403.12, no part of which has been paid to plaintiff.

13. Soon after the work had been commenced, there were delays in the construction of the building caused by the defendant. During the remainder of the Spring, all of the Summer, and part of the Fall, the progress of the work was interrupted by the delays.

On October 20, 1933, plaintiff wrote to the Supervising Architect a letter in which it listed and reviewed the delays and their causes and asked for 100 days' extension for the completion of the building.

On January 13, 1934, the Supervising Architect wrote plaintiff a letter in which he discussed the delays listed by plaintiff and concluded the letter by granting plaintiff 100 additional days as requested.

14. Under the contract plaintiff had until May 30, 1934, to complete the building. By the extension in the preceding finding, plaintiff had until September 7, 1934, to complete the building. Plaintiff had planned its building operations to complete the building in ten months. The building was completed July 17, 1934.

15. If plaintiff had not encountered the delays heretofore referred to, it would have had the building under cover and

enclosed on or about October 1, 1933. The building was under cover and enclosed and the heating plant installed on December 17, 1933.

16. Because of the delays, plaintiff incurred additional expenses, for which it asks reimbursement, as follows:

(a) Labor required for temporary protection and heating of concrete and masonry work, from October 10, 1933, to January 18, 1934, as itemized in plaintiff's exhibit 47	$811.63
(b) Fuel used for temporary heating of materials, masonry and concrete work, from October 23, 1933, to January 2, 1934, as itemized in plaintiff's exhibit 48	304.70
(c) Money expended for miscellaneous lumber, paper, etc., required for temporary enclosure and protection of work from freezing, from October to December 1933, as itemized in plaintiff's exhibit 49	60.70
(d) Labor required in repairing and realigning forms which had shrunk and swelled during the delay periods so that they were out of line, from May 31 to September 5, 1933, as itemized in plaintiff's exhibit 50	99.25
(e) Depreciation on 12,000 square feet of canvas used for covering masonry and concrete work	200.00
(f) Wages paid to superintendent for 98 days additional time required on the job due to delays at $8.00 per day	784.00
(g) Cost of three months' liability insurance on $1,600 additional labor [approximate total of items (a), (d), and (f)], at 6% average rate	96.00
(h) Cost of three months' additional fire, tornado, and riot insurance, average cost $40 per month	120.00
(i) Cost of three months' additional service of plaintiff's Washington, D. C., representative	150.00
Total incurred	2,626.28
Plus 10% overhead	262.62
	2,888.90
Plus 10% profit	288.89
Total plus overhead and profit	3,177.79
Credit—If building had been enclosed on or about October 1, 1933, plaintiff would have had to incur the cost of heating it for two months more, and of which it was relieved because of the delays	$571.20
Total asked for	2,606.59

The court decided that the plaintiff was entitled to recover.

WILLIAMS, *Judge*, delivered the opinion of the court:

Plaintiff seeks to recover the sum of $11,609.71 as damages arising out of an alleged breach of a contract between plaintiff and the defendant for the construction of a post-office building at Rochester, Minnesota.

The amount claimed consists of three separate items.

1. *$8,600.00*, the salvage value of certain buildings on the site of the work which the defendant permitted prior owners to remove therefrom, it being contended that under the contract plaintiff was to receive such buildings as a part of the contract price.

2. *$2,606.59*, additional expenses incurred by the plaintiff in the prosecution of the work caused from delays occasioned by the action of the Government, and

3. *$403.12*, the expense incurred by plaintiff in removing from the site a quantity of plaster and other debris left in the cellars of the various buildings by the former owners in removing their structures therefrom.

These items of the claim will be considered in the order of their statement.

The specifications for the building which accompanied the invitation to bid, provided in part as follows:

> 3. The contractor shall take the site as he finds it and shall remove all old structures within the lot lines. This work shall include the removal of interior walls, piers, partitions, chimneys, stairs, etc., in old basements or cellars. Exterior walls of basements, cellars or other excavations below grade that act as retaining walls, and all walks, paving, or floor slabs on earth, will be removed as specified under excavation, filling and grading.
>
> 4. Common brick and framing lumber taken from old structures may be reused by the contractor in the new construction provided they are suitable and comply with the contract requirements. All other material removed shall become the property of the contractor and shall be taken from the premises as the storage of such old materials or equipment on the site will not be permitted.

5. Bidders shall take into account the salvage value to them of materials removed, and such value shall be reflected in the bids.

Between the time of advertising for bids and the time of the opening of the same, there were ten buildings located on the site of the proposed post office building. Plaintiff, prior to the submission of its bids, went upon the premises and appraised all the buildings located thereon and determined the salvage value of each building. Plaintiff's appraisal of the buildings on the site disclosed that the salvage value to it was $8,600, and having determined by a survey of the plans and specifications what the bid for the furnishing of the labor and materials and construction of the post office building should be, deducted from such amount the sum of $8,600 and submitted its bid for the construction of the building for the sum of $163,500, which represented the amount plaintiff had determined as a proper payment for the work minus the $8,600 representing the salvage value of the buildings referred to.

About a year prior to the execution of the contract in this case the defendant instituted proceedings in the United States District Court for the condemnation of the various lots on which the post office building was to be erected. As a result of these proceedings the District Court duly entered its order condemning the site and appointing commissioners to assess the damages. The various owners and the defendant came to an agreement as to the compensation to be paid to the various owners of the lots involved, as a result of which the court awarded title to the lots to the defendant and awarded to prior owners of the lots the houses and structures located thereon, with directions that the same be promptly demolished or removed from the premises, the final order of the court in this respect having been made on February 2, 1933, one day prior to the formal execution of the contract. Plaintiff was not a party to the condemnation proceedings, and had no notice either of the negotiations leading to the order of February 2, 1933, or of the entering of such order, although plaintiff had learned prior to the acceptance of its bid and the formal execution of the contract that demolition of the buildings on the site was in

progress by the former owners thereof. Before commencement of the work on April 8, 1933, all the buildings on the premises had been demolished by their former owners except one, which was in the process of demolition.

It is a well-settled rule of law that the advertisement for bids and the bid itself when accepted constitute a part of the contract with the government and must be considered in construing the contract. *Mueller* v. *United States*, 19 C. Cls. 581 (affirmed 113 U. S. 153); *Harvey* v. *United States*, 105 U. S. 671; *Proffit* v. *United States*, 42 C. Cls. 248. In the latter case the court said:

> It is well settled that the common-law rule whereby all prior understandings are merged in the subsequent written contract can not be strictly applied to contracts of this character, because they are required to be made by advertisement, bids, and acceptances. These three steps constitute the real contract, and the written instrument is merely a reduction to form of the intention of the parties, as expressed in the prior advertisement, bid, and acceptance.

The specifications in plain unequivocal terms required the demolition and removal of all existing buildings from the site and in equally plain and unequivocal terms provided that all material removed "shall become the property" of the contractor. The specifications also required bidders to take into account the salvage value to them of materials removed and that "such value shall be reflected in the bids." Plaintiff in good faith determined the salvage value of the buildings to be removed was $8,600, and in submitting its bid deducted this amount from what it would otherwise have bid. In these circumstances it is immaterial that the formal contract did not in terms provide that the buildings standing on the site should become the property of the plaintiff, as that provision became part of the contract by reason of the advertisement, bid, and acceptance.

Two days after work was started on the contract plaintiff wrote the supervising architect calling his attention to the fact that the structures which were on the site at the time its bids were submitted had been removed by the former owners and asked for his interpretation of the specifications in respect thereto. Receiving no answer to this letter plain-

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tiff shortly thereafter again wrote the supervising architect and filed a claim for $8,600, the amount it had deducted from its bid as the salvage value of the structures to be removed from the site. What action the supervising architect took upon the claim is not shown other than that no part of it was ever paid to plaintiff.

The defendant contends that plaintiff waived all rights to compensation for failure of the Government to deliver the structures standing on the site when its bid was submitted because it knew at the time the bid was accepted and the formal contract entered into that the structures had been removed from the site by the former owners. It is contended that plaintiff was then under a duty of protesting to the defendant against the changed conditions that had arisen since the submission of its bid, or asserting the right to additional compensation, and that not having done either its claim must fall. We have examined with care the decisions cited by the defendant in support of this contention and it is sufficient to say that none of them has application to the facts in this case.

The failure of the defendant to deliver the buildings in question to plaintiff for demolition and removal from the premises was a breach of the contract, by reason of which plaintiff sustained a loss of the fair and reasonable salvage value of such buildings. The findings show that $8,600 was a fair and reasonable salvage value of the buildings. Plaintiff is therefore entitled to recover in respect to this item of the claim.

Plaintiff was delayed by the defendant in the construction of the building. These delays began soon after the commencement of the work and continued during the remainder of the Spring, all of the Summer, and part of the Fall. Plaintiff wrote the supervising architect about the delays, listing them, reviewing their causes, and asked for 100 days' extension of the contract time because of them. The 100 days' extension was granted as requested. Plaintiff had planned its building operations to complete the building in ten months. Had not plaintiff encountered the delays referred to the building would have been enclosed

and under cover on or about October 1, 1933. Because of the delays the building was enclosed and under cover, and the heating plant installed, on December 17, 1933, and completed on July 17, 1934.

Because of delays caused by the defendant plaintiff incurred additional expenses in the completion of the work which it would not have otherwise incurred. These additional expenses are set out in detail in Finding No. 16, and need not be restated here. It need only be said that the net amount of the additional expenses incurred is $2,606.59. The rule is so well settled that the defendant is liable to plaintiff for the amount of these additional expenses that the citation of authorities in its support is unnecessary. Plaintiff is entitled to recover on this item of the claim.

There was a large amount of plaster and debris left in the cellars of the buildings demolished and removed by the former owners which plaintiff removed. The third item of the claim is for the sum of $403.12, as compensation for the removal of such plaster and debris. The Findings show that this was reasonable compensation for such services but since plaintiff was required by the specifications to remove all rubbish and debris resulting from the work of demolition, including the clearing of basements, cellars, and similar excavations, plaintiff cannot recover on this item. The situation is not changed by the fact that the former owners of the buildings rather than plaintiff demolished and removed them from the premises. It is obvious that had plaintiff performed the work of demolishing and removing the buildings plaster and other debris would have accumulated in the cellars, which plaintiff would have been under contract duty of removing, just as it did in this case. Plaintiff was obligated to perform this service as a part of the contract and compensation therefor was included in the contract price.

Plaintiff is entitled to recover in respect to items 1 and 2 of the claim, amounting to $11,206.59, and judgment in that amount is hereby awarded. It is so ordered.

Whaley, *Judge;* Littleton, *Judge;* Green, *Judge;* and Booth, *Chief Justice*, concur.

JAMES McHUGH SONS, INC. v. THE UNITED STATES

[No. 43155. Decided May 29, 1939]

On the Proofs

Government contract; extra work.—It is held that the evidence sustains the Government's contention that all the items upon which plaintiff bases its claim of extra work and extra costs were specified as a part of the work required by plaintiff's contract with the Government and were shown by the drawings and specifications.

The Reporter's statement of the case:

Mr. Walton Hendry for the plaintiff.
Mr. John B. Miller, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant.

Plaintiff seeks to recover $19,846.46 for alleged extra costs which it claims it was required to expend for alleged extra work not required by a contract between it and the defendant for remodeling a veterans' hospital at Hines, Illinois.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. February 27, 1930, defendant issued invitation for bids for remodeling certain sections and floors of the U. S. Veterans' Hospital, Edward Hines, Jr., at Hines, Illinois. The invitation for bids is of record as defendant's exhibit 4, and is by reference made a part hereof. It contained, among others, the following provision:

> This work includes excavating, mass and reinforced concrete construction, hollow tile, brick work, marble work, floor and wall tile, linoleum floor covering, iron work, metal lathing, plastering, carpentry, changes in elevator entrances, metal weather strips, metal grills, changes in and additions to existing fire escapes, special fastenings for windows and elevator grills, painting, hardware, plumbing, heating, and elevator work; also changes in and additions to existing construction as shown on the drawing.

2. March 22, 1930, plaintiff, in response to the invitation, proposed "to furnish all labor and materials and perform all work required for:"

General Construction

ITEM I. Constructing and finishing complete at U. S. Veterans' Hospital (Edward Hines, Jr.), Hines, Illinois, all interior remodeling and exterior work, including plumbing, heating, electrical work, and changes in elevator entrances in and to Sections F and G, Infirmary Building #1 and in strict accordance with the specifications dated February 27, 1930, and the drawings mentioned therein for the consideration of One Hundred Thirty-Three Thousand Two Hundred and Eighty-eight 00/100 Dollars ($133,288.00).

3. May 29, 1930, plaintiff entered into a contract with the defendant for the performance of the work set forth in Article 1 of the contract reading as follows:

ARTICLE 1. *Statement of work.*—The contractor shall furnish all labor and materials, and perform all work required for constructing and finishing complete at U. S. Veterans' Hospital (Edward Hines, Jr.), HINES, ILLINOIS, all interior remodeling and exterior work, and changes in elevator entrances, in and to Sections F & G, Infirmary Building #1, for the consideration of ONE HUNDRED THIRTY-THREE THOUSAND TWO HUNDRED EIGHTY-EIGHT DOLLARS ($133,288.00), in strict accordance with the specifications, schedules, and drawings, all of which are made a part hereof and designated as follows: Remodeling Sections F-3 & F-4 and Sections G-1, G-2, G-3, & G-4, Infirmary Building No. 1, at U. S. Veterans' Hospital, Edward Hines, Jr., Hines, Illinois, February 27, 1930, and the schedules and drawings mentioned therein; Addendum No. 1, dated March 11, 1930, and the schedules and drawings mentioned therein; as contemplated by Item I of the Contractor's proposal dated March 22, 1930, and Bureau letter of acceptance dated May 29, 1930.

The work shall be commenced promptly after date of receipt of notice to proceed and shall be completed within One Hundred Twenty (120) Calendar Days after date of receipt of notice to proceed.

The contract is of record as plaintiff's exhibit 1; the accompanying specifications, a part of said contract, are of record as plaintiff's exhibit 2; the drawings, consisting of fifteen

blue prints and a part of the contract, are of record as plaintiff's exhibit 3; all of which exhibits are by reference made a part hereof.

Notice to proceed was received by plaintiff June 25, 1930. The original contract date for completion was October 21, 1930. Plaintiff was granted extensions of time totaling 43 calendar days, which extended the date for completion to December 3, 1930. All work under the contract was finally completed on November 25, 1930. No liquidated damages were assessed against plaintiff.

4. The specifications at page 7–A state:

> (p) The contractor is invited to visit that portion of the present Infirmary Building No. 1 covered by these specifications and the drawings and make thorough examination of present arrangement and conditions and compare carefully with new plan mentioned above, and all these comparative conditions shall be considered by the contractor as a part of his bid on the material to be furnished and labor to be performed, and necessary for the removal of present work and material now in place; also for furnishing all new material and labor for the full and satisfactory completion of this work according to these specifications and drawings, and to the satisfaction of the Superintendent in charge of works for the U. S. Veterans' Bureau. Failure to do so will not relieve the successful bidder of the necessity for furnishing either materials or labor or performing any work necessary for the satisfactory condition of each and every item that may be necessary for the full completion of all work shown or specified.

James D. McHugh, plaintiff's president, visited the site of the work and inspected same before submitting plaintiff's bid. He was given full opportunity to make a thorough inspection on the occasion of such visit.

The specifications at page 1 G–5 state:

> The contractor shall keep on the work a copy of the drawings and specifications and shall at all times give the contracting officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern.

In any case of discrepancy in the figures or drawings, the matter shall be immediately submitted to the contracting officer without whose decision said discrepancy shall not be adjusted by the contractor, save only at his own risk and expense. The contracting officer shall furnish from time to time such detail drawings and other information as he may consider necessary unless otherwise provided. Upon completion of the contract the work shall be delivered complete and undamaged.

5. Plaintiff claims that the contract did not require it to install a ventilating system; and that it paid out and incurred expenses in installing said ventilating system, which it did, in the sum of $2,762.21, for which it seeks judgment. The specifications make mention of and refer to the ventilating work, but they contain no details as to the ventilating work required. However, the drawings showed in detail the existing and the new ventilating systems, and the specifications and accompanying drawings, together with an inspection of the premises, were sufficient to advise one familiar with building remodeling work that a ventilating system was required to be installed, and such person would have included the cost thereof in his estimate. In fact, on June 12, 1930, at the request of defendant's superintendent, plaintiff submitted a break-down of its estimate which showed an item included therein for "Heating and ventilating, $3,000." The ventilating requirements could have been set forth in the specifications in more detail, but would have added little to the detailed information given by and shown on the drawings.

On July 26, 1930, the superintendent of construction advised plaintiff that the central office had rejected its proposal in the amount of $2,887 on the ground that the contract drawings plainly indicated the work required. On August 4, 1930, plaintiff presented its appeal, by letter, to the contracting officer. On September 12, 1930, the Acting Director of the Veterans' Administration wrote plaintiff that its appeal was rejected because the installation of the ventilating system was required under the terms of its contract. On October 15, 1930, plaintiff requested a reconsideration by the Acting Director. On October 23, 1930, the Acting Director advised plaintiff that, on further study, the claim was rejected on

the grounds that the ventilating system was clearly shown by the drawings and had become a part of plaintiff's contract.

6. Plaintiff claims that it furnished, at the request of defendant's superintendent, certain plumbing fixtures not contemplated by the contract, and that defendant promised to reimburse plaintiff therefor. This item of the total claim involved is for $7,762.87, including overhead and profit, of which sum the contracting officer and the General Accounting Office allowed plaintiff the amount of $2,766.96.

On November 26, 1930, plaintiff filed its claim with the Veterans' Bureau seeking reimbursement as follows:

Item 2. 10 Foxboro Recording Thermometers	$1,748.60
Item 3. 8 Leonard Thermostatic Control Valves	1,100.00
Item 4. 2 " " " "	275.00
Total	$3,123.60

October 29, 1931, plaintiff submitted to the Veterans' Bureau its revised list of extras for plumbing to which it added 10 percent overhead and 10 percent profit on each of said items, the total claim on each item being as follows:

Item #2	$2,115.46
Item #3	1,331.00
Item #4	332.75
Total	$3,779.21

A continuous-flow bathtub differs from the ordinary cleansing tub, since it is used entirely for therapeutic purposes. It is equipped with a hammock, suspended in the tub, to which nervous patients are strapped. It is equipped with automatic thermostatic control valves and recording thermometer. Thermostatic control valves and recording thermometers are necessary for the efficient operation of continuous-flow tubs, although they are not a part of the tub itself. The manufacturers do not equip such tubs with them, nor are they included when the tubs are sold, unless specially ordered. Among other items of plumbing equipment, which the specifications listed among those to be installed, were nine continuous-flow bathtubs on the first, second, and third floors of Unit G, and one continuous-flow bathtub in Unit F, making a total of ten such continuous-flow bathtubs. There

were no continuous-flow tubs on either the first, second, third, or fourth floors of Unit G, or on the third and fourth floors of Unit F, prior to this contract for remodeling. The proposed location of each of these tubs was shown by the specification drawings, one being on the fourth floor of Unit F, two on the first floor and two on the second floor of Unit G, two on the third floor of Unit G, and three on the fourth floor of Unit G.

7. The specifications contain the following:

> Furnish and install in connection with each continuous-flow tub an approved thermostatic control valve of not less than 15 gallons per minute capacity, having adjustment of maximum temperature of 110 degrees F. and lower. Valve chambers shall have galvanized cast-iron or brass bodies with a reliable thermostatic element and reliable mercurial thermometer placed on each inlet and outlet connection. Each inlet and outlet shall have gate valve placed in accessible position and union connections.
>
> Temperature control valves will be cleaned and installed by the contractor with all necessary valves, fittings, and piping of the kind and size required. Control valves will be enclosed in valve cabinets, manufactured for that purpose in accordance with the following specifications:
>
> *   *   *   *   *
>
> Furnish and install where shown on plans continuous flow bath tubs. Tubs shall be porcelain enameled, 6′–6″ long, Crane Co. Plate No. 6240, Mott Plate No. 806–H, or equal, complete with "Leonard" Knox, or equal, anti-scaling valve with thermometer, lock shield control valve, canvas hammock, restraining sheets, etc., for each tub. * * *
>
> Each continuous-flow tub shall be equipped with a recording thermometer, 10-inch size, with nickel plated case and ring, and with range from 50 to 120 degrees F., as described in Bulletin No. 146 of the Foxboro Company, Inc., Foxboro, Mass., or equal. * * *
>
> The capillary bulb of the instrument shall be installed in the water pipe between instrument and tub, in proper location to indicate the highest temperature of the water flowing into the tub, and water pipe containing bulb shall be installed with necessary union to facilitate easy disconnecting for repairs.
>
> The instrument shall be equipped with a high and low electric alarm attachment, which will cause alarm bell to

be sounded when the temperature rises to a predetermined high point, or drops to a predetermined low point, and also lights a pilot light, in order to warn that the mixing valve furnishing water to the tub is not functioning properly and needs adjustment. The instrument shall be so arranged that a single chart will furnish a continuous record of the actual water temperatures to which one patient is subjected, furnish and deliver the number of these charts to the units in Infirmary Building No. 1, as directed by the Superintendent in charge.

Recording thermometer, bell, pilot light, and any other apparatus necessary shall be mounted on a hand rubbed slab of first-class slate panel of ample size and free from flaws. Panel shall be mounted inside metal cabinet at side of thermostatic temperature control valve. A 110-volt, single phase, 60-cycle light outlet will be provided on wall near cabinets under another section of the specifications, and the "Plumbing" contractor shall make all necessary connections to same.

8. The contract required the Government to furnish the thermostatic control valves for the N. P. patients' showers to be installed in Units F and G, and all other necessary equipment was to be furnished by the contractor. There were to be eight batteries of three showers each in both units, and each battery required one thermostatic control valve, making a total of eight such valves to be furnished by the Government. There were twelve used continuous flow tubs at the hospital at the time plaintiff began its work. After the contract was awarded, plaintiff informed the supervising construction engineer at the hospital that a certain representative of the Government had agreed to furnish the ten continuous flow tubs required under the contract from those already at the hospital. After considerable discussion, defendant furnished plaintiff with the ten continuous flow tubs required under the contract from those already at the hospital. Defendant's superintendent turned over to plaintiff eight thermostatic control valves, which plaintiff cleaned and repaired and put on the N. P. patients' showers. Plaintiff was required to purchase and install on said continuous flow tubs ten Leonard thermostatic control valves and ten Foxboro recording thermometers.

Reporter's Statement of the Case

9. The superintendent of construction ordered the recording thermometers, thermostatic control valves, certain fittings, and other small parts, consisting of nipples, ells, tees, flanges, faucets, etc., necessary for the installation of the continuous flow tubs, at a total cost of $515.54, which sum was paid by the hospital and later deducted from plaintiff's final settlement with the General Accounting Office, because such fittings and small parts were a part of the equipment of the continuous flow tubs and required to be furnished by plaintiff. All of the fittings and small parts were used in connection with the installation of the continuous flow tubs.

December 1, 1930, defendant's superintendent, in his letter to the Director of the Veterans' Bureau recommended that these items, Nos. 2, 3, and 4 (finding 6) be disallowed, concluding his recommendation as follows:

> However, I candidly believe that all the above (including Items 2, 3, and 4) is covered in the specifications and that $1,117.72 could be eliminated as the contractor did not call attention to the shortages until he was ready to install the material. This decision, however, is entirely up to Central Office.
>
> For Central Office's further information, the list of items included in McHugh's letter was furnished by H. P. Reger & Co., subcontractor. This firm lost heavily on this project and they are undoubtedly trying to pull out.

10. November 26, 1930, after final completion, plaintiff made its claim for reimburement for the thermostatic control valves. On February 26, 1931, defendant's superintendent wrote plaintiff advising it that all the items of said claim were "rejected pending further perusal of correspondence by Central Office." No further action was taken until October 29, 1931, at which time plaintiff submitted its revised claim for extras on account of the plumbing and heating fixtures. This item was disallowed.

11. Plaintiff's claim for additional plaster work and furring consisted of five groups, comprising 103 smaller items and one large item concerning the reinforcement of ceilings. The first group embraces 39 items numbered from 1 to 39, inclusive, and concerns pilaster breaks; the second group embraces 36 items numbered from 40 to 75, inclusive, and

relates to furred pilasters; the third group, consisting of 4 items, numbered from 76 to 79, inclusive, relates to plastering columns; the fourth group embraces 24 items numbered from 80 to 103, inclusive, and relates to plastering coves, corner beads, and plaster board; the fifth group relates to the reinforcement of the ceilings.

January 21, 1932, after the submission of plaintiff's claim to the General Accounting Office, the Veterans' Administration rendered an administrative report, in which certain items were recommended for payment and others disapproved. As to the first 39 items concerning pilaster breaks and coves, the Veterans' Bureau recommended the payment of all of 3 and part of 10 items. The remaining items of that group consisting of ordinary patching or furred pilasters were all disapproved, because they were plainly indicated by the drawings and specifications. The second group, numbered from 40 to 75, inclusive, embracing 36 items, concerns furred pilasters. The Veterans' Bureau recommended payment of 15 items of this group. The remaining items of the second group were disapproved. The items recommended for payment consisted of the construction of furred pilasters to cover vertical pipes exposed by removal of partitions which pipes were not clearly indicated by the drawings or specifications. The disapproved items consisted of furred pilasters which the drawings and specification indicated as necessary work to be done under the contract. The four items of the third group consisted of column breaks caused by removal of partitions, each of which consisted of patching required under the contract. The fourth group, consisting of 24 items, was recommended for payment by the Veterans' Bureau on the recommendation of the superintendent of construction and submitted to the Veterans' Bureau on June 15, 1931. The total amount plaintiff claimed for the items so approved was $1,321.90; the total amount recommended by the Veterans' Bureau to the General Accounting Office on these items was $985.22, which last sum has been paid to plaintiff by defendant. $1,050.90 is the estimated reasonable value of the work done on the items disapproved, which sum is based on information obtained by the Bureau at the time from the superintendent of construction and other sources.

12. Pertinent specifications read as follows:

22C–1. *Work Included*.—This contractor shall do all plastering, stucco work, apply plaster boards, etc., and all lathing required therefor as indicated on drawings, as hereinafter specified, or as required to effect full and satisfactory completion. Samples of metal lath and corner beads and base beads shall be submitted for approval.

All plastering in this portion of present Infirmary Building No. 1 disturbed by reason of alterations, additions, and setting of new partitions or relocating of doors and windows or similar work shall be done and restored and finished to match in all respects the existing adjacent work.

22C–2. *Metal Furring*.—Provide metal furring, except as otherwise specified or shown, for suspended ceilings, beams, pilasters, false work, and other similar work required, together with all clips, hangers, wiring, attachments, and connections to construct proper and substantial foundation for plastering. Any metal furring shall be done with steel shapes best suited to the conditions, accurately bent, level or plumb, all members required and erected rigid and secured.

22C–3. *Metal Lath*.—Metal lath shall be provided for all suspended ceilings where present partitions are removed or suspended ceilings required. Wood furring on side walls and all other work required in connection with the alterations, changes, and repairs of plaster work shall be provided.

The lathing shall be either approved galvanized or asphalt coated wire lathing No. 20 gauge (U. S. Standard) 2¼ meshes per lineal inch, and stiffened with ¼″ round steel or V rib spaced eight inches C. T. C., and woven in or clipped in an approved manner or approved expanded metal lath. All metal laths for suspended ceilings shall be ribbed lath weighing not less than 3.5 lbs. per square yard.

Lathing shall be applied straight and without buckling, and nailed with galvanized nails and 1¼″ No. 14 gauge galvanized staples, or wired as necessary with #18 galvanized tie wire. The ribs of lath shall run at right angles to furring on joints.

22C–4. *Corner Beads*.—All external vertical plaster corners shall have metal corner beads to the full height of the corners. All plaster corner beads shall be of an approved make of not less than 26 gauge sheet metal galvanized and shall be rigidly fastened in place at

points not more than six inches apart. All beads must be plumb or level.

The external angles of all corners throughout building for places where corner beads are specified, unless otherwise shown on drawings, shall be provided with approved bull nose or circular surface corner beads of ¾″ radius.

The specifications as amended by the Addendum provide:

22C–6. *Workmanship, Etc.*—The contractor shall see that partitions, openings, grounds, furring, corners, etc., are in place, straight and plumb, before beginning plastering; if not, he shall correct them. Ceilings shall be perfectly level and walls true where partitions have been removed, straight and plumb. This applies particularly to ceilings (Page 2C, Plaintiff's Ex. 2).

* * * * *

Upon completion of the carpentry and other work, the plasterer shall repair any cracks, chipped places, or defects, including patching, and shall be careful not to injure or deface any of the finished work in the building. All pointing and patching of plaster shall match in texture existing plaster work and at the joining with plaster previously applied, shall be sandpapered smooth. Visible joints, cracks, crazes, tool marks, waves, stains, or other defects must not appear in the finished work and plastering shall be left in perfect condition when completed.

* * * * *

"22C–8. *Suspension Ceilings.*—Suspension ceilings shall be built of an approved V rib metal lath attached to pressed steel channels or other approved lines of support with #14 wire and as detailed or required.

"All sheets of metal lath shall be securely fastened together every 24 inches, and wired to lateral supports at every rib at each suspended support. Allow a lap two inches where splices occur at supports, and eight inches lap in other cases.

"The hangers shall be $\frac{3}{16}$ inch galvanized iron wire approximately two feet on centers for support of ¾″ steel channels and shall be secured in a satisfactory manner to the structural concrete. Unless otherwise shown, the minimum clear space between suspended ceilings and the underside of beams shall be 4 inches, but shall be more where this space is not enough to allow passage of pipes, conduits, etc."

13. December 4, 1930, subsequent to the completion of the contract, plaintiff submitted to defendant's superintendent a list of items for extra lathing and plastering. On January 26, 1931, the superintendent, in considering plaintiff's claim for said extras in the amount of $8,850.20, advised plaintiff as follows:

> In accordance with instructions received this date from Central Office, you are advised that the list submitted cannot be favorably considered by the Bureau, as the work contained therein is presumed to have been included in the original proposal for remodeling work.

The contracting officer had previously informed the superintendent and plaintiff that plaintiff's claim had been disallowed; and plaintiff took no appeal from said action of the contracting officer to the head of the department. On April 6, 1931, plaintiff submitted its claim for the extra lathing and plastering to the General Accounting Office.

A contractor, in a remodeling project such as the one covered by this contract and specifications, should expect variations in the walls and ceilings of the old rooms when partitions are removed. The height of the ceilings in neither the F nor the G sections was indicated in either plans or specifications. The third and fourth floors of Unit F, and the first, second, third, and fourth floors of Unit G, had suspended ceilings throughout, were of substantial construction, and capable of carrying the weight of a man.

A proper inspection by plaintiff prior to the submission of its bid would have disclosed that the building contained suspended ceilings. This could have been determined by tapping, as well as by looking into the manholes and hatches which existed in the ceilings at the time of said inspection. In both the F and G sections there were trap doors in the ceilings large enough for an inspector to see that the ceilings were suspended. On the fourth floor of both F and G sections, an inspection from the attic would have disclosed the fact that the ceiling was suspended. There were trap doors in the ceilings of the third floor of section F and the first, second, and third floors of the G section. The ceiling work, for which plaintiff claims an extra, consisted of repairs and patching occasioned by the removal of partitions. The patching done

on the ceilings in approximately 90% of the area did not average more than 10 inches across.

14. Prior to the remodeling, the porches consisted of reinforced concrete slabs cantilevered out at right angles to the wall. They had no support other than the main wall itself, and were equipped with wrought-iron handrailings. It was necessary to enclose the porches with wire and small channel grills, because of the type of patients that were to be hospitalized in that portion of the building. On account of the added weight on the porch, it was necessary to put in extra supports, which called for reinforced columns, starting at the ground.

Sheet "M. F. 1–74" of the drawings shows a porch elevation and a section through the porches which shows the construction from the ground floor to the fourth floor, including the new columns, the solid railing, which is drilled and scored, with a stone fill reinforced on the new concrete columns, and the wire grills. Sheet M. F. 1–74 also contains many details which are designated as "Typical." The porch elevation and section through the porch contains no such designation. The plan indicates a complete porch from the base line to the fourth floor. If any question arose as to this feature of the work, the contractor made no inquiry of any representative of the Government before submitting its bid as to whether or not they were included.

15. On July 10, August 4, and September 16, 1930, plaintiff communicated with defendant's superintendent, calling his attention to the fact that porches F. B. on the third and fourth floors needed support from the first and second floor porches before construction could begin. On September 18, 1930, defendant's superintendent wrote plaintiff as follows:

> The writer received a communication this date from Central Office stating that porches F. B.–3 and F. B.–4 are clearly shown on drawing M. F. 1–74, and are to be considered as part of your Contract V. B. C–687, no extra being allowed.
>
> You are instructed to proceed in accordance therewith.

September 22, 1930, defendant's superintendent again advised plaintiff, in substance, to the same effect as in his letter of September 18, 1930. October 23, 1930, plaintiff, in ac-

knowledging receipt of the superintendent's letter of September 22, stated that plaintiff was proceeding with the work and would submit a claim later. No appeal was taken from the action of the contracting officer to the head of the department.

16. November 18, 1930, plaintiff submitted to defendant's superintendent a tabulation of the costs for the construction of porches F. B.–1 and F. B.–2, in the total sum of $3,617.14, which sum included 10% overhead and 10% profit. March 25, 1931, plaintiff presented to the contracting officer an appeal from the decision rendered by the superintendent on February 26, 1931. April 2, 1931, the Construction Division of the Veterans' Bureau requested of the contractor an itemized statement of its claim, which was submitted on April 4, 1931. On July 17, 1930, the defendant's superintendent, in his written report to the Director of the Veterans' Bureau, stated:

> Letter pencil-marked "2" from James McHugh Sons, Inc., dated July 10, enclosed herewith. They are asking for an additional appropriation to support the porches on F–1 and F–2 in order to carry the increased load as shown on drawing for F. B.–3 and F. B.–4. As detailed drawing does not specify that the work on porches F. B.–1 and F. B.–2 is to be eliminated, the writer's interpretation is that the contractor will have to furnish and install all work shown on the plan M. F.–1–74, in accordance with the details shown therein.

April 17, 1931, the Director of the Veterans' Bureau wrote plaintiff that its claim was rejected on the ground that the work was within the scope of plaintiff's contract.

17. Drawing M. F. 1–F–2 contains the details of metal door frames and borrowed light frames. It shows a metal fin projecting into the plaster at an inward angle from the edge of the frame and the plaster at an obtuse angle locked under the fin and flush with the outside edge of door or borrowed light frame. This method is usually adopted on this type of door frame, because it reduces the danger of chipping. Should the fin project outward, and should the plaster be placed flush with the frame, there is produced a featheredge in the plaster which is likely to chip. To overcome this tendency, a V-groove is placed in the plaster, next to the door, in order to obviate the featheredge on the plaster.

18. June 21, 1930, plaintiff wrote the chief of construction, submitting four copies of details for steel door bucks for wood doors, frames for borrowed lights, and access panels required on sections F-3 and 4, G-1, 2, 3, and 4 of said hospital, and asked the Veterans' Bureau to give said detail drawings their approval. The detail drawing differed from the specification details in that it showed a door and borrowed light frame with a metal fin projecting outward from the frame and the V-groove formed in the plaster next to the frame so that the plaster was not flush with the frame. On June 23, 1930, said drawing was approved by the Veterans' Administration. There were no steel door bucks or borrowed light frames on the third and fourth floors of section F or in section G prior to the remodeling work. They were all wooden bucks and frames. New doors and new door bucks were installed throughout the two units.

19. V-Grooves in the plaster are formed as follows: After the door bucks or light frames have been placed and the partition set, the plaster is applied, usually in three coats; the first coat is known as the scratch coat; the second is known as the brown coat; and the third is known as the finishing coat; after the second coat is applied, the plasterer runs his trowel along the edge of the frame; when the brown coat has set, the finishing coat is applied; and with a V-shape tool the plasterer forms the V-groove around the frame.

The record shows that for a normal door with a transom, such as was used in this contract, said operation should require about 15 minutes per side, making a total time per door of about 30 minutes; that the cost of said work per door, at the rate of wages then paid the plasterers was about 85 cents; that the entire cost of said operation is labor cost, since no material is involved; that $1.00 per door would be a fair estimate of the cost of said operation. The record further discloses that borrowed light frames are smaller than the doors, and that the reasonable cost of such operation, per borrowed light, was approximately 50 cents. There was a total of 286 door bucks requiring said V-grooves and 19 borrowed light frames requiring V-grooves.

20. August 1, 1930, plaintiff submitted to defendant's superintendent a proposal for cutting V-grooves in the plaster

around each side of all doors and borrowed light frames for the sum of $1,912.

On August 2, 1930, the defendant's superintendent forwarded plaintiff's proposal to the contracting officer stating as follows:

> As this is a rather important matter, central office's comments are requested as to whether the extra money called for will be allowed for installing this "V" or if the plastering will be the flush type as shown on the plans and also on the enclosed sketch.
>
> Wired authority or refusal is requested.

On August 9, 1930, the superintendent wrote plaintiff that, under instructions from the central office, his proposal was rejected. This letter read as follows:

> Reference your letter of August 1, submitting proposal for cutting V-shaped groove in the plaster adjacent to and around the sides of all doors and borrowed light frames.
>
> In accordance with instructions received from central office this date, you are advised that this proposal is rejected.
>
> Details of the metal door frames and borrowed lights as shown on drawing MF1–F–2 indicate a flush finish for this section.
>
> Under date of June 21 you, as contractor, forwarded details for steel door bucks for wood doors, frames for borrowed lights and access panel, which drawing was approved under date of June 24. Your attention is invited to the Sykes drawing #13, Bureau #721, which drawing was approved as submitted, and indicated that the detail was arranged for a V-shaped groove in the plaster adjacent thereto. In accordance with this part of the plan, a mold as arranged on this frame requires a groove to prevent the feather edge of the plaster from falling off.
>
> Your attention is invited to the fact that if the shop drawings had been prepared in accordance with the details shown on the contract drawings, it would not have been necessary to install the groove mentioned. Therefore, as the drawings as submitted by you was approved, and in accordance with this drawing the V-groove type of plaster is called for, you are directed to proceed and install this V-groove, no allowance for extra work being allowed.

Opinion of the Court

21. On August 27, 1930, plaintiff submitted to the contracting officer his appeal from the decision rejecting his proposal in which he made claim for $1,912 as extra work. This extra work was for plastering and forming the V-shaped grooves which was performed by plaintiff's subcontractor to whom plaintiff paid for doing said work the sum of $1,525.

September 9, 1930, the chief of the construction division rejected plaintiff's claim, calling its attention to the fact that the fin was revised by plaintiff itself necessitating the V-groove, and that any additional work required was plaintiff's responsibility. On September 23, 1930, plaintiff was similarly advised by the Acting Director of the Veterans' Bureau. On June 24, 1931, plaintiff filed its claim in the General Accounting Office, which claim reduced the amount from $1,912 to $1,525. The claim was disallowed.

The court decided that the plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The extra work and extra costs which plaintiff contends it was required by defendant to perform and incur outside the requirements of its contract dated May 29, 1930, are as follows:

Installing ventilating system	$2,887.00
Installing plumbing fixtures	4,599.62
Reconstruction of ceilings	7,717.70
Construction of porches	3,617.14
Extra plaster work around door frames and borrowed lights	1,525.00

The defendant contends that all the items upon which plaintiff bases its claim were specified as a part of the work required by plaintiff's contract with the Government and were shown by the drawings and specifications. We think the defendant's position is correct. The drawings and specifications which are in evidence adequately disclose and refer to all the work upon which plaintiff bases its claim for extra compensation.

An invitation for bids for remodeling certain portions of the United States Veterans' Hospital at Hines, Illinois, was issued on February 27, 1930. The form of contract, the draw-

ings, and the specifications, under which the work specified in the invitation for bids was to be performed, were available to plaintiff at that time. On March 22, 1930, plaintiff, after an inspection of the premises, submitted its bid for $133,288, which was accepted by the defendant, and a contract was entered into May 29, 1930. Plaintiff commenced work thereunder June 25, 1930, and completed the same within the time allowed. The invitation for bids, after specifying certain alterations, also included in the work to be done "changes in and additions to existing construction as shown on the drawings." Plaintiff proposed to furnish all labor and material and perform all work in strict accordance with the specifications and drawings mentioned therein, and the contract contained similar provisions. In the specifications plaintiff was invited to visit the portion of the buildings covered by the specifications and drawings, to make thorough examinations of the present arrangements and conditions, and to compare same carefully with the new plan. Under the terms of the specifications all such comparative conditions were to be considered by the contractor as a part of his bid on the material to be furnished and labor to be performed, and also for the furnishing of all new materials and labor for the full and satisfactory completion of the work according to the specifications and drawings. Plaintiff visited the site of the work before submitting its bid and was given full opportunity to make a thorough inspection. The specifications provided, among other things, that "Anything mentioned in the specifications and not shown on the drawings or shown on the drawings and not mentioned in the specifications shall be of like effect as if shown or mentioned in both."

The evidence shows, and we have found as facts, that the specifications and the accompanying drawings, together with a proper inspection of the premises, were sufficient to advise one familiar with building remodeling work of all the work required to be performed upon which plaintiff bases its claim for extra compensation.

1. *Ventilating System.*—The specifications definitely required work in connection with the ventilating system as a part of the plaintiff's contract. On page 43, under the head-

ing of "Mechanical Equipment," the specifications stated as follows:

> The general conditions set forth at the beginning of the specifications shall govern when practicable for all work in connection with plumbing, heating, ventilating, and electrical work shown on the drawings or specified herein.
>
> *Work Included.*—This section of the specifications includes the finishing and installation in complete working order of plumbing, sanitary, and storm-sewer connections, hot and cold water with the building, roughing in for cooking equipment, and certain plumbing and other fixtures furnished by the Government, refrigerating units for drinking water, changes in and additions to heating and ventilating system, changes in and extension of conduit and electrical service, light, cooking and power, pipe covering, etc.

Paragraph M, page 7a, of the specifications provided that new materials for construction not otherwise clearly specified should be of the same character, grade, and finish as that used in similar locations in other parts of the building, and that this included plumbing, heating, ventilating, and electrical equipment. A ventilating system was clearly disclosed and shown by the drawings. Ventilating ducts and registers already in the building were shown on the drawings on the floors of the building on which they were located and the drawings further showed the new work to be performed and the new ventilating ducts and registers, with the sizes thereof and the places where they were to be installed, which ducts and registers were not in the building at the time the contract was made. The drawings specified the size of the sheet-metal ventilating ducts and the registers, and there is no evidence that the defendant required plaintiff to install ventilating ducts and registers other than those shown on the drawings or to furnish material therefor different or more expensive than the material of which the ventilating system already in the building was constructed.

2. *Plumbing Fixtures.*—The material facts with reference to this item of plaintiff's claim are set forth in findings 6 to 9, inclusive. This item of the claim relates to furnishing and installing thermostatic control valves, recording thermom-

eters, and continuous-flow bathtubs. The contract is definite and specific in its requirement that the contractor shall furnish this equipment, although defendant furnished tubs then on hand. The specifications on page 43 provided "Special attention is called to the fact that within 30 days after the date of acceptance of bid the contractor must submit to the Director a complete list of the following material * * * giving the name and address of manufacturer and also, when so required for proper identification, the trade name and catalogue number of the following material proposed to be used in the work."

The items listed thereafter on page 44 of the specifications included "Plumbing fixtures. Thermostatic Regulators for hot water with Recording Thermometer," and on page 45 of the specifications the term "Plumbing Fixtures as indicated on drawings of new arrangements" is broken down and shown in separate items, among which is listed nine continuous-flow bath tubs to be installed in Unit G, 1st, 2nd, 3rd, and 4th floors, and one continuous-flow bath tub in Unit F of the building. Paragraph IP–35, page 59 of the specifications required the contractor to "furnish and install in connection with each continuous-flow tub an approved thermostatic control valve, etc." Paragraph IP–35, page 60 of the specifications, provided that the contractor should "furnish and install, where shown on the plans, continuous-flow tubs. * * * Each continuous-flow tub shall be equipped with a recording thermometer * * *." These provisions are clear and unambiguous, and show positively that plaintiff was required to perform the work and furnish the materials upon which this item of the claim is based. Included in this item of the claim is the claim of plaintiff for compensation for the cost of certain tub fittings for the continuous-flow bath tubs installed. The materials in question were part of those required to be furnished by plaintiff under its contract. They were all used in connection with the installation of the continuous-flow tubs. The specifications, at page 49, after providing that all plumbing fixtures, except those specifically referred to, should be furnished and set by the contractor, stated that the "Plumbing Contractor shall deliver

all of the above equipment to the building in which the same is to be placed * * * and shall set up and install each piece of the apparatus in location shown on the drawings and connect same complete in working order to the water, waste, and vent piping."

3. *Reconstruction of Ceiling Plaster*.—The material facts with reference to this item of the claim appear in findings 11 to 13, inclusive. Paragraph (f), page 6–A of the specification, provided that "All patching and repairing of existing work shall be neatly and substantially performed without conspicuous jointing of the new with existing work. Existing work damaged by the contractor in the performance of his work shall be made good by the contractor without expense to the Government." The greater weight of competent evidence of record shows that plaintiff is not entitled to recover on this item and that a proper inspection of the premises at the time the bid was made would have disclosed that the work, upon which this claim is based, was required by the contract and the specifications.

4. *Construction of Porches*.—The material facts with reference to this item of the claim are set forth in findings 14 to 16, inclusive. Plaintiff contends that it was not required under its contract, drawings, and specifications to construct the porches, F. B.–1 and F. B.–2, described in these findings. In view of the disclosures in the drawings, made a part of plaintiff's contract, and the provision in the specifications that anything mentioned in the drawings, even though not mentioned or shown in the specifications, should be of like effect as if shown or mentioned in both, we think the work which the plaintiff was required to perform in connection with these porches was required by the contract. An examination of the drawing MF 1–74, which was a part of plaintiff's contract, discloses that a complete porch is shown from the ground floor to the fourth floor of the building. The drawing is entitled "Enclosed Porch Details," and includes details of the enclosures, all of which are marked "typical elevations," "typical details," "typical plan," "detail of steel," "detail of jambs," etc. The sketch of the porches as a whole is not designated detail or typical, but designated "Elevation

of East Side of Porch and Fire Escape." Sheet MF 1–F2 of the drawing contains a mere outline of the location of the F. B. porches in the F section of the building with the notation "See sheet MF 1–74." In regard to porches F. A., the specification, page 3–C, contains the notation that "The porch F. A. as indicated on sheet MF 1–F2 is in another contract and shall, under no circumstances or interpretations, be considered a part of this contract." It seems clear that unless some such exception were made in regard to the F. B. porches here involved, the plaintiff's contract required that they be constructed as shown on the drawings. The drawings, made a part of the plaintiff's contract, showed the details of such construction. The drawings were adequate and sufficiently clear to disclose to the plaintiff at the time of its inspection and bid that construction of these porches was required and no inquiry was made or contention advanced that their construction was not within the terms of plaintiff's contract until after the contract had been executed and the work begun. Plaintiff argues that because the first and second floors of section F of the building were being remodeled under another contract it had the right to assume that such other contract included the F. B. porches on those floors. The evidence does not support the contention that the porches were included in another contract. If assumptions are to be made from the specifications and drawings, the logical one would be that the other contractor of the F section was required to build the entire series of F. A. porches from the ground to the fourth floor and that the entire F. B. porches were in plaintiff's contract, because the specifications plainly stated that the F. A. porches were, under no circumstances, to be considered as a part of plaintiff's contract but were in another contract. If plaintiff had any doubt at the time it made its inspection and bid as to whether the F. B. porches in question shown in detail on its drawings were included as a part of the work under its contract, it should have made some investigation or inquiry to determine the matter. The supervising superintendent of construction, under whose direction and approval the specifications and drawings were prepared, was at the site of the work or available at the time plaintiff

made its inspection and submitted its bid. Plaintiff commenced work under its contract June 25, 1930, and the superintendent of construction ruled on July 17, 1930, that the work necessary to the construction of porches F. B. 1 and F. B. 2 was within the requirements of plaintiff's contract. A like decision was again made on September 18 and September 22, 1930, and the decision of the superintendent of construction was approved by the Director of the Veterans' Bureau on April 17, 1931.

5. *Plaster Work in forming* V-*grooves around Door Frames and Borrowed Light Frames.*—The material facts with reference to this item of plaintiff's claim are set forth in findings 17 to 21, inclusive. The specifications call for a type of door buck and borrowed light frame with a metal fin projecting into the plaster at an inward angle from the edge of the frame, so that the plaster around the frame formed an obtuse angle under the fin and flush with the outside edge of the door buck and borrowed light frame. When plaintiff came to install these door and light frames and perform the plaster work around them, it submitted to defendant for approval a type of frame with the fin projecting at an outward or obtuse angle from the buck or frame and showing the plaster containing a V-groove where it joined the door buck or frame. The type submitted by plaintiff and shown on its shop drawing was approved by the contracting officer as submitted. No claim was made at that time, nor was any claim made until after the work made the basis of this item of the claim was performed, for extra compensation because of the necessity of making the V-groove around the frames made necessary by reason of the type recommended and submitted by plaintiff. The evidence shows that the plaintiff knew at the time it submitted this drawing for approval that the V-groove was necessary with the substituted type of frame. After plaintiff had installed the door and light frames, it submitted a proposal for extra cost for cutting the V-groove around the frames. This proposal was rejected by the defendant on the ground that plaintiff could, if it had so desired, have used the type of

frame called for by the specifications. Had this been done, the making of the V-grooves around the doors would not have been necessary. In these circumstances it is clear that no extra work within the meaning of the contract was required by the defendant and no extra work order was issued by the defendant under Art. 5 of the contract.

Plaintiff is not entitled to recover and its petition is dismissed. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

HAMPTON & BRANCHVILLE RAILROAD COMPANY v. THE UNITED STATES

[No. 43251. Decided May 29, 1939]

On the Proofs

Jurisdictional Act; res judicata.—Where Congress, in the Jurisdictional Act, conferred upon the Court of Claims jurisdiction "to hear, determine and render judgment upon the claim" of plaintiff, representing the amount of a judgment recovered by the United States from plaintiff, it is held that the defense *res judicata* was waived, as much so as if the waiver had been stated in precise terms.

Same.—The sole question submitted to the Court by the Jurisdictional Act was the determination of the correctness of the judgment awarded to the Government in the District Court of the United States and it must be assumed from the language used in the Act that Congress intended the Court to decide and determine this question on the merits and to waive any and all defenses which would prevent the Court from doing this.

The Reporter's statement of the case:

Mr. Randolph Murdaugh for the plaintiff.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant.

The court made special findings of fact as follows:

1. On August 14, 1935, there was approved the following Act:

> To confer jurisdiction upon the Court of Claims to hear, determine, and render judgment upon the claim of the Hampton and Branchville Railroad Company.
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That jurisdiction is hereby conferred upon the Court of Claims, to hear, determine, and render judgment upon the claim of the Hampton and Branchville Railroad Company, of Hampton, South Carolina, against the United States for the sum of $4,768.46, representing the amount of a judgment recovered by the United States from such company by virtue of a certain guaranty contract between such company and the United States entered into in accordance with the provisions of Section 209 of the Transportation Act, 1920.
>
> SEC. 2. The Court of Claims is authorized and directed to make such detailed examination of the accounts of such company as may be necessary in order to ascertain the amount, if any, due such company by the United States by virtue of such contract.
>
> SEC. 3. Such claim may be instituted at any time within six months after the enactment of this Act, notwithstanding the lapse of time or any statute of limitations. Proceedings in any suit brought in the Court of Claims under this Act, appeals therefrom, and payment of any judgment therein shall be had as in case of claims over which court has jurisdiction under Section 145 of the Judicial Code, as amended. (49 Stat. 2140.)

The petition herein was filed January 27, 1936.

2. Plaintiff is a common carrier of the State of South Carolina. Its name was formerly Hampton & Branchville Railroad & Lumber Co. It extends from Hampton to Smoaks, a distance of 24 miles.

3. In March of 1920 the Interstate Commerce Commission accepted a written statement from the plaintiff that it accepted all the provisions of section 209 of the Transportation Act, 1920, approved February 28, 1920 (41 Stat. 456, 464). Plaintiff was not a carrier under Federal control. On June 10, 1920, the Commission issued an order prescribing the accounting procedure to be observed by all carriers

accepting the provisions of section 209, for the purpose of arriving at the amount payable under the guaranty provision of section 209.

4. Plaintiff did not adopt the prescribed accounting procedure and in July of 1921 attempted to withdraw its acceptance of the terms of section 209, but the withdrawal was not acceded to by the Commission.

5. Plaintiff filed no reports under section 209, and nothing was done in the matter until two examiners were sent to plaintiff's offices by the Commission to make an audit. The result of this audit was communicated to the plaintiff by letter from the Commission March 27, 1924. This letter is in evidence as plaintiff's Exhibit No. 3 and is made part hereof by reference. In this audit there were six specific exceptions taken to the plaintiff's method of accounting. The plaintiff February 20, 1925, indicated its acceptance of these specific exceptions, but did take some exceptions to the net income as found by the examiners for the guaranty period.

Thereafter, the Commission specified an amount it had found to be due from the plaintiff to the United States under Section 209 of the Transportation Act of 1920, and upon refusal of the plaintiff to pay the same instituted suit therefor in the United States District Court for the Eastern District of South Carolina and obtained a judgment therefor, $4,768.46, which judgment was subsequently paid by plaintiff.

6. The amount so recovered was based on books of account that had not been kept as required by the Interstate Commerce Commission, and did not reflect accounts kept according to regulations prescribed under section 209.

Had the books been kept and entries therein made in accordance with those regulations the examiners could properly have found no amount due from plaintiff to the United States.

An audit now made of plaintiff's accounts, corrected to comply with the Commission's regulations, shows that the sum of $4,768.46, recovered as aforesaid, was not due the United States under section 209 of the Transportation Act, 1920.

The court decided that the plaintiff was entitled to recover.

WILLIAMS, *Judge*, delivered the opinion of the court:

Plaintiff, the Hampton & Branchville Railroad Company, located in the State of South Carolina, sues under the special jurisdictional act, set forth in the Findings, to recover the sum of $4,768.46. This amount represents a judgment obtained by the United States against plaintiff under a guaranty contract made pursuant to the provisions of Section 209 of the Transportation Act of 1920, 41 Stat. 456, 464.

There is no controversy between the parties as to the facts of the case. Plaintiff is a common carrier of the State of South Carolina but was not a carrier under Federal control, although it filed with the Interstate Commerce Commission its acceptance of the guaranty provisions of Section 209 of the Transportation Act of 1920. The plaintiff, however, did not adopt the accounting procedure prescribed by the Interstate Commerce Commission and made no reports to the Commission as required by Section 209 of the Act. Examiners of the Interstate Commerce Commission made an audit of plaintiff's books and notified plaintiff that there was due the United States the sum of $4,768.46 under Section 209 of the Act. Plaintiff excepted to this finding of the Commission and refused to pay the amount demanded. Whereupon suit was instituted in the United States Court for the Eastern District of South Carolina, as a result of which a judgment was obtained against the plaintiff for the sum of $4,768.46, which judgment was paid by plaintiff. The amount of the judgment was based on plaintiff's books of account which had not been kept as required by the Interstate Commerce Commission in accordance with its regulations prescribed under Section 209. Had plaintiff's books been kept and the entries therein made in accordance with the regulations prescribed by the Interstate Commerce Commission, the examiners could not properly have found any amount due from the plaintiff to the United States. An audit of plaintiff's accounts, corrected to comply with the Commission's regulations, showed that the sum of $4,768.46 recovered in the District Court of South Carolina, was not

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due the United States under Section 209 of the Transportation Act of 1920.

The defendant concedes that the plaintiff was not indebted to the United States for the amount of the judgment rendered in the District court of the United States, but contends that this court is without jurisdiction to render **judgment for the amount as the matter is *res judicata*. It is** contended that the jurisdictional act makes no admission of liability or of any ground of liability on the part of the United States but merely provides a forum for the adjudication of the claim according to applicable legal principles. It is argued that the special act does not waive the defense of *res judicata* and does no more than authorize the court to make such detailed examination of plaintiff's accounts as may be necessary in order to ascertain the amount, if any, due it by the United States by virtue of the contract which it made with the Interstate Commerce Commission pursuant to Section 209 of the Transportation Act.

While the jurisdictional act does not in express terms waive the defense of *res judicata* in respect to the judgment obtained by the defendant against plaintiff in the District Court of the United States, there can be no doubt, when the act is considered as a whole, that such was the intent and purpose of Congress, otherwise the passage of the jurisdictional act was an idle gesture and conferred no benefit whatever on plaintiff. When Congress conferred jurisdiction on the court "to hear, determine, and render judgment upon the claim of the Hampton and Branchville Railroad Company * * * against the United States for the sum of $4,768.46, representing the amount of a judgment recovered by the United States from such company," it follows necessarily that the defense *res judicata* was waived, as much so as if the waiver had been stated in precise terms. The sole question submitted to the court by the jurisdictional act was the determination of the correctness of the judgment awarded to the defendant in the District Court of the United States and it must be assumed from the language used in the Act that Congress intended the court to decide and determine this question on the merits and to waive any and

all defenses which would prevent the court from doing this.

The plaintiff is entitled to recover and is hereby awarded judgment in the sum of $4,768.46. It is so ordered.

WHALEY, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

H. HERFURTH, JR., INC. v. THE UNITED STATES

[No. 43338. Decided May 29, 1939]

On the Proofs

Government contract; work performed by subcontractor.—Where subcontractor entered upon the site of the work and performed certain work under its subcontract before the formal contract between the prime contractor and the Government had been executed, and such contract was in fact never executed, it is held that the subcontractor has no claim against the Government.

Same.—Expectation of payment for work performed by a subcontractor does not create an implied contract, even when the structure is used by the Government.

The Reporter's statement of the case:

Mr. Archie K. Shipe for the plaintiff. *Esch, Kerr, Taylor & Shipe* and *Mr. Henry P. Thomas* were on the briefs.

Mr. J. Robert Anderson, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is a Virginia corporation with its principal office and place of business in Washington, D. C.

2. In compliance with an invitation for bids by the Navy Department on September 15, 1933, George W. Stetson, Jr., of Boston, Mass., on October 18, 1933, submitted a bid for the performance of certain work in connection with the installation of a boiler plant at the Navy Yard, Washington, D. C. After the opening of the bids Stetson was advised on October 31, 1933, that his bid of $306,990 was accepted and that a formal contract would be prepared and for-

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warded to him for execution at an early date. A requirement existed that a performance bond be furnished by the successful bidder within ten days after the prescribed forms should be submitted to such bidder by the defendant.

3. November 16, 1933, defendant forwarded to Stetson a formal contract and bond for appropriate execution, and in a letter of transmittal called attention to the necessity for returning the executed contract and bond within ten days.

4. November 27, 1933, Stetson entered into a contract with plaintiff as subcontractor for the performance of a part of the work covered by the contract referred to in finding 2, as follows:

SUBJECT: CONCRETE FOUNDATIONS & FLOORS BOILER HOUSE—NAVY YARD—WASHINGTON, D. C., BUREAU OF YARDS & DOCKS SPEC. # 7428

In accordance with our recent conversations on the above subject, we are issuing the following order:

(1) Boiler Column Foundations.

(2) Reinforced concrete floor at Elev. 16.41 and the bases for forced draft fans and their operating units.

(3) Reinforced concrete floor at Elev. 25.16, which is identified as the Stoker Floor, and its connections to the existing floor at Elev. 27.41.

(4) The placing of all anchor bolts in concrete, for the above. These bolts are to be furnished by us.

(5) The furnishing and erecting of the large steel beam (20″), and its various steel supporting columns, for the support of the existing floor at Elev. 27.41.

(6) All breaking out of the existing floor at Elev. 27.41 required for item (3), and cutting off the projecting beams.

(7) Extension of the concrete work in connection with the existing ash sluice trench on the east side of the building.

(8) The necessary excavation and backfilling in connection with the above concrete work.

The price for the above work, which must be in accordance with the plans and specifications, and to the approval of the Bureau of Yards and Docks is, THREE

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THOUSAND FOUR HUNDRED AND SEVENTY-FIVE DOLLARS ($3,475.00).

Payments to you will be in proportion to the amounts received monthly from the government by us, for work covered under this order. One exception being that your final payment will not be held up until our contract is completed.

Please bear in mind that in all instances your work must match up with the two existing boilers recently installed in the southeast corner of the building.

All materials not claimed by the government are to become your property. We trust that all bases for columns and equipment will be finished off smooth and level at elevations indicated on the government drawings.

5. At the time of the execution of the contract referred to in finding 4 between plaintiff and Stetson, plaintiff was under the impression that Stetson had been awarded the contract and that all formalities incident to the execution of the contract had been completed by Stetson, though no such advice had been furnished to plaintiff by defendant's representatives. November 27, 1933, plaintiff's representatives, including a foreman and laborers, proceeded to the place where the work was to be performed and commenced the work at the direction of Stetson's representative and under the supervision of representatives of the Navy Department. At the time the work was started the representative of the Navy Department in charge of the supervision of that work was unaware that Stetson's contract with defendant had not been executed and that the required performance bond had not been furnished.

From November 27 until December 7, 1933, plaintiff proceeded with the work called for by its contract with Stetson and carried on such work under the supervision and inspection of representatives of the Navy Department. December 7, 1933, plaintiff learned that Stetson had not executed his contract with defendant and furnished the performance bond as required, and when that information came to plaintiff, the latter ceased work under its contract with Stetson.

6. In the meantime, and continuing until January 15, 1934, the Navy Department endeavored to secure appro-

priate execution of the contract with Stetson and the furnishing of the required bond, but without success, with the result that on January 15, 1934, the Navy Department advised Stetson as follows:

> In view of your long-continued failure to enter into contract in accordance with your accepted bid under specification 7428, for boiler plant installation at the Washington Navy Yard, and to give bond for faithful performance and proper fulfillment of such contract, as required (the prescribed forms of such contract and bond having been submitted to you by the Bureau's letter of November 16, 1933, for signature), the Bureau is constrained hereby to declare you in default with respect to your obligation in this regard.
>
> New bids for this project have been invited, to be opened in the Bureau at eleven o'clock a. m., January 24, 1934. A copy of the advertisement therefor is inclosed.

7. January 15, 1934, defendant advertised for bids for the same work which had been awarded to Stetson, and on January 24th a contract was awarded to another contractor who carried out the work at a cost of $321,413.43. In the advertisement for the new bids bidders were asked to state the amount that would be deducted from their bids on account of the work performed by plaintiff under its contract with Stetson. The successful bidder indicated that the amount to be deducted from his bid on account of plaintiff's work was $250. That amount was not arrived at by such bidder on the basis of an accurate appraisal of the work but rather as an arbitrary deduction which he made from his total bid in an effort to secure the contract.

8. The reasonable value of the work performed and material furnished by plaintiff under its contract with Stetson between November 27 and December 7, 1933, was $750, which was likewise the approximate cost to plaintiff for the performance of such work, including a reasonable amount for overhead and profit. The entire work performed and material furnished by plaintiff were made use of in the completion of the contract for the defendant by the successful bidder under the award of January 24, 1934.

9. Plaintiff duly presented a claim to the defendant for the value of the work performed and material furnished

under the contract with Stetson heretofore referred to, but that claim was disallowed by the Comptroller General. In connection with the submission of that claim the Bureau of Yards and Docks of the Navy Department submitted a recommendation to the Judge Advocate General of the Navy, which concluded as follows:

> Inasmuch as the Government has received the benefit of the work done by H. Herfurth, Jr., Inc., at the Washington Navy Yard, the Bureau recommends that such equitable consideration as may be practicable be given this claim.

The plaintiff likewise endeavored to collect its claim from Stetson, but without success, and no amount has been paid the plaintiff on account of the work performed and material furnished under its contract with Stetson.

The court decided that the plaintiff was not entitled to recover.

Whaley, *Judge*, delivered the opinion of the court:

This suit is brought by the plaintiff to recover the reasonable value of work performed and materials furnished in connection with the installation of a boiler plant at the Navy Yard, Washington, D. C.

The contract for the work at the Navy Yard was awarded to George W. Stetson, Jr., as the lowest bidder for a stated sum and Stetson was to execute a formal contract which was to be prepared and forwarded to him at an early date. This formal contract was forwarded to him on November 16, 1933, and required the furnishing of a performance bond to accompany the return of the signed contract to the Navy Department. On November 27, 1933, plaintiff entered into a written contract with George W. Stetson, Jr. Without any notice from the defendant or George W. Stetson, Jr., that a formal contract had been executed and a performance bond furnished, plaintiff entered upon the site of the work and performed between November 27, 1933, and December 7, 1933, certain work under its subcontract. Stetson failed to execute a formal contract or furnish the bond required and on January 15, 1934, after notice to Stetson, the Navy De-

partment again advertised for bids and on January 24, 1934, awarded the contract to another contractor for a larger sum than that which Stetson had bid.

The petition shows that the plaintiff endeavored to collect from the prime contractor, Stetson, for the value of the work performed by it but failed to be successful in its efforts. Plaintiff sues on an implied contract for the value of the work performed. It is apparent that the contract was between the defendant and Stetson, and plaintiff was a subcontractor under a written contract with Stetson. The work was not performed for the Government but for Stetson. There was no contractual right, expressed or implied, between the plaintiff and the defendant. Plaintiff possessed no privity of contract with the defendant. Its entrance on the site and performance of the work were under a written contract with the contractor who had been awarded a contract with the defendant but who failed to comply with its terms which required signing a formal contract and furnishing a performance bond. Expectation of payment for work performed by a subcontractor does not create an implied contract, even when the structure is used by the Government. *Chesapeake and Potomac Telephone Company* v. *United States*, 281 U. S. 385.

In *Merritt* v. *United States*, 267 U. S. 338, 341, the Supreme Court held:

> The Tucker Act does not give a right of action against the United States in those cases where, if the transaction were between private parties, recovery could be had upon a contract implied in law.

Under similar circumstances, if the contract were between private parties, recovery could not be had except against the contractor. *Alexander & Alabama Western R. Co.*, 179 Ala. 480, 490, 60 So. 295. Plaintiff was not a party to the contract and therefore cannot bring suit against the Government. *New York Shipbuilding Company* v. *United States*, 65 C. Cls. 457; *Pneumatic Gun-Carriage and Power Co.* v. *United States*, 36 C. Cls. 71, 88.

Although plaintiff has no juridical remedy against the Government, nevertheless it has performed work in the

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Navy Yard at Washington, D. C., and the Government is now enjoying the benefits thereof. Plaintiff's remedy is with the Congress.

The petition is dismissed. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

INTERNATIONAL MILLING COMPANY v. UNITED STATES

[No. 43514. Decided May 29, 1939]

On the Proofs

Income tax; credit to corporation for foreign tax paid by subsidiary.—Where a domestic corporation owned all of the stock of a Canadian subsidiary, and on April 2, 1931, received dividends which were included in its income as returned for taxation in the income-tax return for the year ending August 31, 1931, and the corporation in said return claimed a credit for taxes paid in Canada by the subsidiary, it is held that to determine the taxpayer's correct credit under Section 131 (f) of the Revenue Act of 1928 the amount of foreign tax paid by the subsidiary is to be multiplied by the ratio between (1) dividends paid out of accumulated profits for the year and (2) the accumulated profits for each year rather than by the ratio between dividends received and total profits of the subsidiary.

Same.—The term "with respect to," as used in the statute permitting a domestic corporation which receives dividends from a foreign subsidiary to claim credit for taxes paid by said subsidiary on or "with respect to" accumulated profits, means "with reference or relation to" or "pertaining to," and applies to the accumulated profits from which such dividends were paid.

Same; definition.—The definition of the term "accumulated profits" is to be accepted or discarded entirely.

Same; legislative intent.—Where prior Revenue Act permitted domestic corporation which received dividends from a foreign subsidiary to claim credit for taxes paid by subsidiary in proportion which amount of dividends bore to total profits but later statute permitted credit in proportion which amount of dividends bore to accumulated profits, the legislative intent was to change the method of calculating credit which might be claimed.

Same.—Legislative history of the statute supports the construction of the 1928 Act contended for by the plaintiff.

Reporter's Statement of the Case

Same.—The decisions of the courts have also supported plaintiff's contention. *F. W. Woolworth* v. *U. S.*, 91 Fed. (2d), 973; *Peavey & Co.* v. *U. S.*, 73 C. Cls. 600, cited.

Same; administrative construction.—It is a well-settled doctrine that much weight will be given to a long-continued construction of an indefinite or ambiguous statute by the executive department charged with its administration but such construction is not conclusive.

The Reporter's statement of the case:

Mr. Paul E. Shorb for the plaintiff. *Messrs. M. P. Wormhoudt, Dwight Taylor,* and *Covington, Burling, Rublee, Acheson & Shorb* were on the brief.

Mrs. Elizabeth B. Davis, with whom was *Mr. Assistant Attorney General James W. Morris,* for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

During the year 1931 the plaintiff, a domestic corporation, owned all of the stock of Robin Hood Mills, Ltd., a Canadian corporation, and on April 2 of that year plaintiff received from Robin Hood, Ltd., $1,000,000 in dividends. This $1,000,000 of dividends was paid out of the profits of Robin Hood, Ltd., for the fiscal years 1929, 1930, and 1931 segregated by years as follows: $302,022.49, $529,302.70, and $168,674.81.

On November 24, 1931, plaintiff filed its Federal income tax return for the year ending August 31, 1931. In this return it included in its income the amount of $1,000,000 of dividends received from Robin Hood, Ltd., and claimed a credit for taxes paid in Canada by Robin Hood, Ltd., in the amount of $106,210.15. Plaintiff's income-tax return for the taxable year, after allowance for said $106,210.15 foreign tax credit plus other foreign tax credits, disclosed a tax due of $143,892.87, which was paid to the collector of internal revenue in quarterly installments, the last payment being made on August 16, 1932, in the sum of $35,973.21.

Thereafter the Commissioner of Internal Revenue determined that plaintiff's foreign tax credit under section 131 (f) was allowable in the sum of $96,252.63 instead of $106,-

210.15. The Commissioner made certain reductions in plaintiff's net income (not now in controversy) so that the reduction in the foreign tax credit resulted in a deficiency of $7,514.08, which, plus interest of $724.95, was paid to the collector by plaintiff on July 17, 1933.

In determining plaintiff's foreign tax credit under section 131 (f), revenue act of 1928, the Commissioner used a "new" form 1118. Under said "new" form the Commissioner determined the foreign tax credit (items 9 and 10) by multiplying item 8 in the form (ratio of dividends received (item 2) to accumulated profits (item 4)) by item 7 (ratio of accumulated profits (item 4) to total profits (item 3) times foreign taxes paid (item 5)). This results in the following formula:

$$\frac{\text{Dividends received}}{\text{Accumulated profits of subsidiary}} \times \frac{\text{Accumulated profits of subsidiary}}{\text{Total profits of subsidiary}} \times \text{Foreign tax paid} = \text{Credit.}$$

Under the "old" form 1118 used by the Commissioner prior to the taxable year 1931, item 6, the foreign tax credit under section 131 (f) was determined by multiplying item 5 in the form (ratio of dividends received (item 1) to accumulated profits (item 2)) by item 4 (foreign tax paid). This resulted in the following formula:

$$\frac{\text{Dividends received}}{\text{Accumulated profits of subsidiary}} \times \text{Foreign tax paid} = \text{Credit (Item 6).}$$

Prior to about August 1930 the consistent practice of the Commissioner was to determine the credit allowable under section 131 (f), revenue act of 1928, and corresponding provisions of prior revenue acts, in accordance with the method shown in old Treasury Department form 1118 mentioned above. Under this form when a controlled foreign corporation distributed to its American parent corporation all its income and profits for a taxable year remaining after payment of the foreign income and profits taxes for said year, the American corporation would be entitled as a credit under section 131 (f) to all of the foreign taxes thus paid by the foreign corporation.

Subsequent to August 1930 the consistent practice of the Commissioner was to determine the credit in accordance with the method shown in the new form 1118 mentioned above. Under this form when a controlled foreign corporation distributed to its American parent its income and profits remaining for a taxable year after payment of foreign income taxes, the American corporation would not be entitled to 100% of the foreign taxes as a credit but only the percentage thereof represented by the ratio of (1) the dividends paid, to (2) the income and profits before deduction of foreign taxes.

Plaintiff on August 6, 1934, filed with the collector a claim for refund of taxes in the sum of $10,406.57 for the taxable year. In this claim the taxpayer contended that it was entitled under Section 131 (f), revenue act of 1928, to a credit of not less than $106,681.15 for taxes deemed to have been paid Canada on the $1,000,000 dividend. The claim alleged that the foreign tax credit was properly computed under the old form 1118 and that to determine taxpayer's correct credit under Section 131 (f), the amount of foreign income and profits taxes paid Canada by Robin Hood for each year should be multiplied by the ratio of (1) dividends paid out of accumulated profits for each year to (2) the accumulated profits for each year.

The Commissioner thereupon redetermined plaintiff's foreign tax credit under section 131 (f) for the taxable year to be $95,975.18 and to arrive at this credit multiplied the foreign taxes accrued or paid by Robin Hood for each year by the ratio of (1) dividends paid out of accumulated profits for each year, to (2) total earnings and profits for each year. Plaintiff's claim for refund was rejected by the Commissioner on March 10, 1936, and no part of this claim has been paid to plaintiff.

The court decided that the plaintiff was entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

This is a suit to recover $11,131.52 income taxes and interest for the fiscal year ending August 31, 1931, which the plaintiff claims have been overpaid in that amount.

Opinion of the Court

The issue in the case is the proper construction of section 131 (f) of the 1928 act which relates to the credit which a domestic corporation owning the majority of the voting stock of a foreign corporation may obtain by reason of such a corporation having paid taxes to a foreign country.

Section 131 of the act of 1928 permits a credit or deduction to be made upon income in certain cases for taxes paid to a foreign country, among which is one where a domestic corporation owns the majority of the voting stock of a foreign corporation which has paid taxes to a foreign country. The portion of the statute prescribing how the credit is to be computed reads as follows:

> SEC. 131. (f) TAXES OF FOREIGN SUBSIDIARY.—For the purposes of this section a domestic corporation which owns a majority of the voting stock of a foreign corporation from which it receives dividends (not deductible under section 23 (p)) in any taxable year shall be deemed to have paid the same proportion of any income, war-profits, or excess-profits taxes paid by such foreign corporation to any foreign country or to any possession of the United States, upon or with respect to the accumulated profits of such foreign corporation from which such dividends were paid, which the amount of such dividends bears to the amount of such accumulated profits: *Provided*, That the credit allowed to any domestic corporation under this subsection shall in no case exceed the same proportion of the taxes against which it is credited, which the amount of such dividends bears to the amount of the entire net income of the domestic corporation in which such dividends are included. The term "accumulated profits" when used in this subsection in reference to a foreign corporation, means the amount of its gains, profits, or income in excess of the income, war-profits, and excess-profits taxes imposed upon or with respect to such profits or income; * * *. (45 Stat. 791, 830.)

The 1918 act in section 240 (c) contained a provision for a credit under similar circumstances, but, as we shall see later, this provision was differently worded and provided for a different method of computing the credit.

The provision now being considered first appeared in section 238 (e) of the revenue act of 1921 (42 Stat. 227, 259)

and has been used without substantial change through the subsequent acts, including section 131 (f) of the 1928 act above quoted under which the instant case arose.

The corresponding section of the revenue act of 1918 (240 (c)) reads as follows:

> For the purposes of section 238 a domestic corporation which owns a majority of the voting stock of a foreign corporation shall be deemed to have paid *the same proportion* of any income, war-profits, and excess-profits taxes paid (but not including taxes accrued) by such foreign corporation during the taxable year to any foreign country or to any possession of the United States upon income derived from sources without the United States, *which the amount of any dividends* (not deductible under section 234) *received* by such domestic corporation from such foreign corporation during the taxable year *bears to the total taxable income of such foreign corporation upon or with respect to which such taxes were paid: Provided*, That in no such case shall the amount of the credit for such taxes exceed the amount of such dividends (not deductible under section 234) received by such domestic corporation during the taxable year. [Italics ours.] (40 Stat. 1057, 1082.)

It will be seen that the amount of foreign taxes paid for which the domestic taxpayer was entitled to credit under the 1918 statute depended upon the proportion "which the amount of any dividends * * * received * * * bears to the total taxable income of such foreign corporation upon or with respect to which such taxes were paid."

The difference is plain. In the 1921 act the words "total taxable income" were stricken out and the words "accumulated profits" were substituted and a definition of the term "accumulated profits," as used in the section, was added. The controversy in the instant case is as to the effect of these changes and particularly with reference to the meaning of the words "accumulated profits" as used in the 1921 act and subsequent statutes containing the same provision.

There is no dispute as to the facts upon which the decision depends. The plaintiff, a domestic corporation, owned during the fiscal year ending August 31, 1931, and prior thereto, all the stock of Robin Hood Mills, Ltd., a foreign cor-

poration incorporated in Canada. On April 2, 1931, plaintiff received from Robin Hood Mills, Ltd., $1,000,000 in dividends which were paid out of the undivided profits for the years ending August 31, 1929, 1930, and 1931, the total of which was $1,720,688.09, and out of which Robin Hood, Ltd., paid a total amount of taxes of $160,340.15.

In November 1931 plaintiff filed its Federal income tax return for the year ending August 31, 1931, and in this return included in income the amount of $1,000,000 dividends received from Robin Hood, Ltd., and claimed a credit in the amount of $106,210.15. A claim for this credit was made on Treasury Department form 1118, commonly referred to as the "old" form, which was the regular form used by the Bureau of Internal Revenue prior to the taxable year 1931. Subsequent to the filing of plaintiff's income-tax return, additional taxes were paid to Canada by Robin Hood, Ltd., on its income for the year 1931.

Plaintiff's income-tax return claimed a foreign tax credit of $106,210.15 and disclosed a tax due of $143,892.87 which was paid by the plaintiff to the collector in quarterly installments.

Thereafter the Commissioner of Internal Revenue determined that plaintiff's claim for credit for foreign taxes was overstated and the proper amount allowable was $96,252.63. As a result of other reductions in plaintiff's net income (not now in controversy) an additional tax of $7,514.08 was assessed and paid by the plaintiff with interest.

In determining that plaintiff's foreign tax credit was $96,252.63, the Commissioner used the "new" form 1118. The terms "new" form and "old" form will be hereinafter explained.

For many years prior to August 1930 the consistent practice of the Commissioner was to determine the credit allowable under section 131 (f) of the revenue act of 1928 in accordance with the method shown in the "old" form. Subsequent to August 1930 the consistent practice of the Commissioner was to determine the credit allowable under section 131 (f) of the revenue act of 1928 in accordance with the method shown by the "new" form.

On August 6, 1934, the plaintiff filed a claim for refund on the ground that it was entitled to a credit for foreign taxes paid in the amount of $106,681.15. The Commissioner redetermined the plaintiff's foreign tax credit and computed it to be $95,975.18. Thereupon this suit was brought.

The method of calculating the credit to which the taxpayer was entitled under the revenue act of 1918 is perfectly clear. The ratio or proportion is ascertained by dividing the amount of any dividends paid to the domestic corporation by the total profits of the subsidiary, and the formula for the purposes of the calculation is as follows:

$$\frac{\text{Dividends received}}{\text{Total profits of subsidiary}} \times \text{Foreign tax accrued or paid} = \text{Credit.}$$

The plaintiff claims that the ratio or proportion under the statutes from 1921 to 1928, and thereafter, should be ascertained by dividing the amount of dividends received by the accumulated profits and that the formula would be—

$$\frac{\text{Dividends received}}{\text{Accumulated profits of the subsidiary}} \times \text{Foreign tax accrued or paid} = \text{Credit.}$$

This formula is what is called the "old" form and, as before stated, is what was used by the Commissioner beginning with the act of 1921 down to and including the act of 1928 until about August 1930. From and after the date last named, the Commissioner used a formula which is as follows:

$$\text{Foreign tax accrued or paid} \quad \frac{\text{Accumulated profts of subsidiary}}{\text{Total profits of subsidiary}} \times \frac{\text{Dividends received}}{\text{Accumulated profts of subsidiary}} = \text{Taxes deemed to have been paid on profits distributed as dividends.}$$

This is ordinarily referred to as the new form.

It will be noticed that in determining the ratio, this formula uses two fractions in the first of which "accumulated profits of subsidiary" are used as the numerator and in the second they are used as the denominator. Consequently in the multiplication called for by the formula

the accumulated profits will be canceled out of the two fractions with the result that the formula in fact is the equivalent of—

$$\text{Foreign tax accrued or paid} \times \frac{\text{Dividends received}}{\text{Total profits of subsidiary}} = \begin{array}{c}\text{Taxes deemed to have been}\\ \text{paid on profits distributed as}\\ \text{dividends.}\end{array}$$

It will be observed that this formula makes no use of "accumulated profits" as defined in the statute, nor can the form be deduced from the directions of the statute with reference to computing the credit. It is in fact, as we view it, merely a mathematical device for avoiding the method prescribed by the statute which directs in ascertaining the amount of tax paid that the same proportion shall be taken of the taxes paid to the foreign country which the "amount of such dividends bears to the amount of such accumulated profits," and in the same paragraph "accumulated profits" when used in this subsection are defined to be "the amount of its gains, profits, or income in excess of the income, war-profits, and excess-profits taxes imposed upon or with respect to such profits or income." Instead of taking the ratio of the dividends received to accumulated profits, as directed by the statute, the Commissioner used, as shown above, the ratio of dividends received to the *total* profits of the subsidiary.

It will be conceded that the statute is in one respect ambiguous. While the term "accumulated profits" is explicitly defined in the law, the definition is not entirely consistent with the use of the term in another part of the statute. In the first part of the statute it is stated that the domestic corporation shall be deemed to have paid "the same proportion of * * * taxes paid * * * to any foreign country * * * upon or with respect to the accumulated profits of such foreign corporation from which such dividends were paid, which the amount of such dividends bears to the amount of such accumulated profits." In the instant case the taxes were not paid entirely "upon" the "accumulated profits" as defined in the statute, but were paid upon the total profits. They were, however, as we

think, paid "with respect to" the accumulated profits, which is an alternative under the statute—necessarily so, because unless so construed the words "with respect to" mean nothing and might just as well have been omitted. The term "with respect to" means "with reference or relation to," or "pertaining to," and applies to the "accumulated profits * * * from which such dividends were paid." These terms are descriptive in their application and not necessarily restrictive—that is, confined to one class when there is more than one in the same situation. Here it could be said that the taxes were imposed "upon" or "on" the "accumulated profits" and they were also imposed on the "total profits" which included the accumulated profits. While the statute is not clearly worded, we think a consideration of the section as a whole shows its intent. Congress having specifically defined the term "accumulated profits," this definition must be either accepted or discarded entirely. It is only by entirely rejecting or striking out this definition that the construction contended for by defendant can be sustained. There is no alternative. Certainly Congress did not intend that it should be discarded but that it should be used, and it must be used as a whole for it can not be separated into parts. The words "with respect to accumulated profits" would seem to have been intended as meaning merely taxes that were applied to accumulated profits as defined in the statute, without considering the fact that they were also applied to the remainder of the total profits.

There is another matter which should be considered in determining the intent of Congress as expressed in the 1921 act and statutes subsequent thereto. The 1918 act was clear and definite. It did not use the words "accumulated profits" but instead "total profits" and it included no definitions because they were unnecessary. Under it the amount of the credit would be ascertained by the same formula as now used by the Commissioner. All of this must have been clearly understood by Congress and if that body had intended that the same result should follow under the 1921 act and acts subsequent thereto, would it not have used the same language instead of using different terms which were defined in the statute? What object could there have been

in so doing except to prescribe a different method of computing the tax and obtaining a different result? We think it must be concluded that Congress with the 1918 act before it deliberately decided to prescribe a different method as explained by Senator Smoot in the manner shown in the next paragraph, otherwise it would have simply retained the 1918 form.

The legislative history of the statute in question supports the construction contended for by plaintiff. The revenue act of 1918 made no mention of accumulated profits and definitely provided that the ratio of the credit should be that which the amount of dividends bore to the total taxable income of the foreign corporation upon which the taxes were paid. When the act of 1921 was before the House of Representatives, the provisions in controversy were not in the bill as passed by the House, but when the bill came before the Senate, Senator Smoot offered an amendment including them. In answer to questions with reference to the meaning of the new provision, the Senator explained how it would work in a hypothetical case. It is not necessary to set out the language used in the debate as it is conceded by the defendant that the explanation and example given by Senator Smoot are in accord with plaintiff's contention. In the ordinary course, the amendment with Senator Smoot's explanation went to both Senate and House and was ratified, thus showing the understanding of Congress as to how the amendment should be construed.

The Smoot amendment first appeared in section 238 (e) of the revenue act of 1921 and was used without change through the subsequent acts including section 131 (f) of the 1928 act. The old form (1118) which was used by the Bureau of Internal Revenue prior to the taxable year 1931 provided that the amount of tax payments made by the foreign subsidiary should be multiplied by the ratio of the amount of dividends received to accumulated profits. This, as before stated, was the consistent practice of the Commissioner prior to about August 1930, and is the method which plaintiff now contends should be used. Not until the issuance, in February 1933, of Regulations 77 under the revenue act of 1932 did the regulations contain the formula used by the

Commissioner in the case now before the court. It is a well settled doctrine that much weight will be given to a long continued construction of an indefinite or ambiguous statute by the executive department charged with its administration. *National Lead Co.* v. *United States*, 252 U. S. 140, 145. One important reason for this rule is that where the practice is long continued Congress must be presumed to be aware of the administrative practice and by failing to take any legislative action has evidenced that this practice was in accordance with the intention of the legislators. Subsequent to the enactment of the 1921 revenue act, the acts of 1924, 1926, and 1928 were passed, each making a practically complete revision of the income tax laws. During this period and as we have above noted, up to August 1930, the Bureau made no change in its administrative practice, and Congress has not altered the law up to the present time. While these facts are not conclusive, they furnish another support to the contentions of the plaintiff.

Lastly it must be said that the decisions of the courts have also supported plaintiff's contention. The same issue as the one here involved was considered by the court in the case of *F. W. Woolworth Co.* v. *United States*, 91 Fed. (2d) 973 (certiorari denied), and the Circuit Court of Appeals for the Second Circuit in determining what credit should be given the plaintiff for taxes paid by its Canadian subsidiary also applied the rule which we have approved in what is stated above.

The exact question involved in the case now before us was not considered in the case of *Peavey & Co.* v. *United States*, 73 C. Cls. 600. The court did, however, in a computation made in one of its findings follow the rule which we have laid down above and in its opinion applied it in construing section 238 (e) of the 1921 act.

In the argument on behalf of defendant attention is called to the case of *Burnet* v. *Chicago Portrait Co.*, 285 U. S. 1, and it is correctly said that this case held that the object of legislation allowing individuals or domestic corporations to deduct credit for taxes paid to foreign countries was to avoid double taxation. The opinion rendered in that case calls attention to the fact that in computing the

taxable income of a citizen of the United States he is credited with the amount of any income taxes paid to a foreign country and that in the same way the revenue act of 1921 allowed "a credit to a domestic corporation, against its income tax here upon dividends received from its foreign subsidiary, of a proportionate part, *as defined*, of the income taxes paid by that subsidiary to 'any foreign country'." [Italics ours.]

We think the case last cited supports the plaintiff's contention rather than being against it. As we construe the statute it prevents double taxation. It must be admitted that the plaintiff, owning all the stock of the Canadian corporation, in effect paid all the Canadian taxes and its situation was no different in this respect than it would have been if it had conducted the Canadian concern as a branch establishment. If the plaintiff does not get full credit for the taxes paid in Canada it is doubly taxed as much as an individual would be who paid taxes in a foreign country and failed to get credit therefor.

Our conclusion is that a comparison of the present statute with the act of 1918; a consideration of the language of the statute, especially the definition of "accumulated profits" contained therein; the legislative history of the section under consideration and the decisions of the courts, all sustain the contention of the plaintiff as to the manner in which its credit for foreign taxes should be computed.

It follows from what has been stated above that the plaintiff is entitled to recover and the petition asks for judgment for $11,131.52 with interest. The parties to the action may file a stipulation as to the amount for which plaintiff is entitled to judgment under this opinion with interest from specified dates, if they can so agree. If not, the court will have the calculation made and judgment entered accordingly.

WHALEY, *Judge;* WILLIAMS, *Judge;* and BOOTH, *Chief Justice*, concur.

LITTLETON, *Judge*, is of opinion that in determining the allowable credit to the domestic corporation, in view of the statutory definition of the term "accumulated profits," the ratio of the dividends received by the domestic corporation

to the accumulated profits of the foreign subsidiary is to be applied to the proportion of the tax paid by the subsidiary to the foreign country "upon or in respect to the accumulated profits of such corporation" rather than to the total tax paid by the foreign corporation to the foreign country upon or with respect to the total net taxable income of such foreign corporation—that is, that the tax paid by the foreign corporation to be used as a basis for the credit is the proportion of foreign tax attributable to the foreign corporation's "accumulated profits" available for distribution as dividends to the domestic corporation.

IDENTIFICATION DEVICES, INC., JAMES M. RULONG v. THE UNITED STATES

[No. 43639. Decided May 29, 1939]

On the Proofs

Patents; validity.—It is held that the evidence shows that the plaintiff's patent is invalid for lack of invention for the reason that every element of the single claim of the patent has been met by disclosures in prior patents.

Same; infringement.—It is held that the evidence establishes that the Certificates of Identification and the Continuous Discharge Book used by defendant and alleged to constitute an infringement of the Rulong patent do not respond to claim 1 of the patent in suit.

Same; limitation of claim.—The claim must be limited to the device or structure specified in the claim; the patent statute requires a patentee to specify and point out the parts which he claims to be new. *White* v. *Dunbar*, 119 U. S. 47, 52, cited.

Same; competence of evidence.—Where the prior art patents offered and received in evidence show when they were filed and granted, and they were so offered and received in evidence under a stipulation that certification thereof was waived, it is held that the Letters Patent Certificate of the Commissioner of Patents and the seal of the Patent Office were not necessary to make them competent as evidence.

The Reporter's statement of the case:

Mr. James M. Rulong for the plaintiff.

Mr. J. F. Mothershead, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant.

Reporter's Statement of the Case

Plaintiff sues to recover $50,000 as compensation for the alleged unauthorized use by the defendant of Letters Patent No. 1,910,476 granted to James M. Rulong May 23, 1933. On that date, by an assignment duly recorded in the Patent Office, the patent was assigned to Identification Devices, Inc. Rulong owned substantially all the stock of the corporation.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. On May 18, 1932, James M. Rulong filed application, serial no. 612081, in the United States Patent Office for an identification device. On May 23, 1933, a patent on this application was issued, #1,910,476, and thereafter an assignment was made by the inventor to the Identification Devices, Incorporated, dated April 1, 1935, recorded in Liber D–163, page 630, in the United States Patent Office. A copy of the patent, plaintiff's exhibit no. 1, and a copy of the assignment, plaintiff's exhibit no. 3, are by reference made a part of this finding.

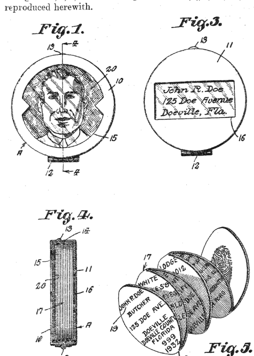
2. At the time of the alleged infringing acts upon which this action is founded, plaintiff, the Identification Devices, Inc., was a corporation duly organized and existing under and by virtue of the laws of the State of Florida. A certified copy of such articles of incorporation dated March 6, 1935, plaintiff's exhibit no. 2, is by reference made a part of this finding. Identification Devices, Inc., the plaintiff, is the owner of the legal title in and to the Rulong letters patent #1,910,476, the patent in suit. The plaintiff and its predecessor have never granted any licenses or other rights to anyone under the Rulong patent #1,910,476, nor has anyone ever been authorized to make, use, or sell devices made in accordance with said patent.

3. Neither plaintiff nor its predecessor has ever sold devices of the character shown in the patent in suit; a few samples have been made.

4. The Rulong patent in suit has for its object a device which carries identification data. It consists generally of two elements, to wit: 1, a container or holder; and 2, identification data contained therein.

Reporter's Statement of the Case

Figures 1, 3, 4, and 5 of the patent in suit, #1,910,476, are reproduced herewith.



Figures 1, 3, 4, and 5 of the Rulong Patent in Suit #1,910,476

The device is designed to be carried on the person of its owner and is small and compact for convenience and may be carried in a pocket of the apparel. The chart upon which the identifying data is printed consists of a series of disks or leaves connected at one edge, which fold one upon the

other producing an accordion like structure capable of extension, or when folded returning to a small compass.

When the chart is in position to be placed within the holder it presents on one outside disk a photograph of the owner and on the other outside disk his name and address. Other connected disks between the first and last provide surfaces to receive fingerprints, enlistment date, et cetera, in fact any identifying data.

The container or holder has windows or openings on either side so that the photograph and the name and address of the owner on the two disks within can be readily seen exteriorly. The container consists of two members hinged at one point to allow it to open in order that the chart or connected disks on which the identifying data is placed can be inspected or removed.

5. The patent contains but a single claim which reads as follows:

> A device of the kind described comprising a plurality of disk-like members hinged alternately at opposite sides with each other to provide an extensible chart, said members having on opposite faces thereof identifying indicia, and a hingedly connected two-part casing receiving said members and having exposure openings in said parts for exhibiting indicia on the members next thereto.

6. By an amendment to sec. 4551 of the Revised Statutes of the United States, as amended (U. S. C., 1934 Ed., Supp. II, Title 46, sec. 643), approved March 24, 1937, U. S. Code, 1934 Ed., Supp. IV, Title 46, sec. 643, it is provided among other things that

> SEC. 4551. (a) Every seaman upon a merchant vessel of the United States of the burden of one hundred gross tons or upward, except vessels employed exclusively in trade on the navigable rivers of the United States, shall be furnished, at the option of the seaman, with a book to be known as a continuous discharge book or with a certificate of identification, which book or certificate shall be retained by the seaman and shall contain the signature of the seaman to whom it is so furnished and a statement of his nationality, age, personal description, photograph, thumbprint, and home address. Such books or certificates shall be issued by the shipping com-

missioners, or, at ports where no shipping commissioners have been appointed, by collectors or deputy collectors of customs or United States local inspectors of steam vessels, in such manner and form as the Director of the Bureau of Marine Inspection and Navigation, subject to the approval of the Secretary of Commerce, shall determine. Any individual, firm, partnership, corporation, or association which shall issue any such book or certificate, or make any statement or endorsement therein, except as authorized by the provisions of this section, or issue any imitation of any such book or certificate, shall be deemed guilty of a misdemeanor and shall be imprisoned not less than one month nor more than three months, in the discretion of the court. * * *

7. Pursuant to this Act of Congress shipping commissioners or, at ports where no shipping commissioners have been appointed, collectors or deputy collectors of customs or United States local inspectors of steam vessels are directed to issue to seamen either a continuous discharge book or a certificate of identification containing the signature of the seaman, a statement of his nationality, age, personal description, photograph, thumbprint, and home address.

8. Within six years prior to the filing of the petition in this case the United States made and used through the Bureau of Marine Inspection and Navigation of the Department of Commerce, Seaman's Certificate of Identification, plaintiff's exhibits nos. 6, 7, and 8, and Continuous Discharge Books, plaintiff's exhibit no. 9, which exhibits are by reference made a part of this finding.

9. A Seaman's Certificate of Identification is an engraved document which bears at the top the heading "United States Department of Commerce, Bureau of Marine Inspection and Navigation" with the pictorial representation of a steamship, bearing a serial number with appropriate blank portions in which are entered the name of the seaman, his address, place and date of birth, and citizenship. Also, if the applicant seaman is an alien he must indicate whether or not first papers for naturalization have been filed, and if not the date of a head tax if such is paid. Upon the face of the certificate there is space provided within which a photograph of the seaman is affixed, and another space to receive his thumbprint.

Furthermore, the applicant must sign his name partially across the already affixed photograph. The officer of the United States who issues the certificate must thereafter execute the certificate setting forth his official title. Delivery of the certificate is then made to the applicant.

The Duplicate Certificate of Identification corresponds exactly to the previously described certificate, save that across its face appears in red ink the word "Duplicate."

The practice in the Bureau of Marine Inspection and Navigation of the Department of Commerce, in case of loss of the certificate of identification, provides for the issuance of a Temporary Seaman's Certificate of Identification, plaintiff's exhibit no. 8.

10. The temporary certificate carries all the identification data as the original certificate of identification, but it does not require a photograph of the seaman to be affixed thereto.

11. The Continuous Discharge Book, plaintiff's exhibit no. 9, is a book of thirty-two pages, the upper right-hand corner portion of each page being notched or cut away. The covers of the book are of relatively stiff material, the front cover having an overlap or supplemental member hinged which folds over the edge of the book in its closed position. The front cover has a number stamped on its face, the seal of the Department of Commerce, and the legend "Continuous Discharge Book." The front cover has an aperture or cut-out portion at a point near its top over which aperture is fastened a sheet of transparent material.

The first page of the book has a blank space provided in which the name of the seaman is to be written, and the blank space is in registry with the cut-out portion of the front cover so that the name written on the first page of the book can be seen through the transparent opening in the cover. There is no aperture or window opening in the back cover of the book.

Page two has a rectangular space at its upper right corner in which a photograph of the seaman is affixed and the seal of the Bureau of Marine Inspection and Navigation is required to be impressed partly over the photograph and on the page. The remaining space on page two has appropriate blank spaces for the name of the seaman, date of birth,

statement of personal description, and the signature of the issuing officer, his title, and the port at which the book is issued.

Page three provides spaces for entries concerning place of birth, naturalization data, date of first papers, date of head tax if alien, and nationality, home address of seaman, officer's license or seaman's certificate, and the grade and number of each. The seaman must affix his signature at the bottom of page three. The remaining pages in the book down to page thirty-one, inclusive, contain entry spaces for the following data: name of ship, official number and class, date and place of engagement, rating, description of voyage, date and place of discharge, signature of master and shipping commissioner, and official stamp. At page thirty-two there is printed sec. 6 of the act of June 25, 1906, setting forth the penalties for illegal use of the continuous discharge book, while on the inner side of the back cover there is a blank space for the home address of the seaman to be entered by the seaman, also directions to the seaman in case of loss of the book.

12. The Seaman's Certificate of Identification, Seaman's Certificate of Identification (duplicate), Temporary Seaman's Certificate of Identification and the Continuous Discharge Book, plaintiff's exhibits nos. 6, 7, 8, 9, and 12 do not respond to Claim 1 of Rulong patent #1,910,476, the patent in suit.

13. On or about the first day of June 1937 there was issued to an applicant seaman at Jacksonville, Florida, by the United States Officer at that Port, a Temporary Seaman's Certificate of Identification, plaintiff's exhibit no. 8, and also a Continuous Discharge Book, plaintiff's exhibit no. 9. The seamen applicants for such certificates and continuous discharge books properly filled out Application Form 719–B, plaintiff's exhibit no. 12, a copy of which is by reference made a part of this finding.

14. There have been printed by or for the United States prior to February 10, 1938—

200,000 copies of Seaman's Certificate of Identification (original);

10,000 copies of Seaman's Certificate of Identification (duplicate);

100,000 copies of Temporary Seaman's Certificate of Identification.

There is no evidence of the number of continuous discharge books manufactured by or for the United States.

15. The prior art cited by the Patent Office during the prosecution of the application which eventuated into the patent in suit was as follows:

United States letters patent #1,342,817, issued to Frederick A. Kohlhepp, June 8, 1920.

Austrian letters patent #74,087, issued to Jan Gruchala, November 15, 1916.

Copies of these patents, defendant's exhibits nos. 3, 4, and 4a, are by reference made a part of this finding.

16. The following additional prior art patents were available to those skilled in the art prior to the filing of the application which eventuated into the patent in suit:

PRIOR ART PATENTS

United States letters patent #1,246,369, issued to Harry J. Winans, November 13, 1917.

United States letters patent #632,752, issued to George H. Rogers, September 12, 1899.

United States letters patent #1,238,655, issued to Marcus P. Exline, August 28, 1917.

United States letters patent #1,352,907, issued to Thomas P. Martin, Jr., September 14, 1920.

British letters patent #1838 of 1868, issued to Nahum Salamon.

British letters patent #20,833 of 1914, issued to Jules Gauvreau.

Copies of the above prior art patents are by reference made a part of this finding.

17. United States letters patent to Kohlhepp #1,342,817, defendant's exhibit no. 3, discloses a hinged locket container, Figs. 2, 4, and 6, adapted to receive an identification tag. The locket consists of two parts: one, a body portion, and three, a "frame" hinged to said body portion.

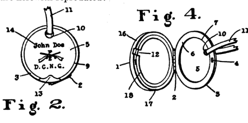
The patentee states in his specification, lines 65 to 77, inclusive, page 1, as follows:

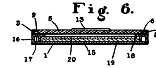
It is to be understood that the body portion 1 and frame 3 may be swung together, flatwise of each other,

into closed position, and a suitable catch 4 is provided opposite the hinge 2 for holding said body portion and frame in such closed position. The construction of the frame 3 is such that it will support an identifying tag 5, such as is used by soldiers, and as shown in this disclosure the tag is preferably exposed at the outside of the locket so the locket does not have to be opened to read the identification on the tag.

The body portion 1 of the locket is intended to contain a photograph or keepsake, but no provision is made by which this photograph can be viewed from the outside.

Figures 2, 4, and 6 of the Kohlhepp patent #1,342,817 are herewith reproduced:



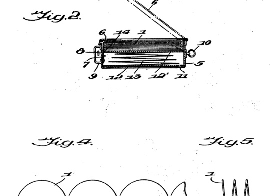


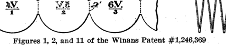
18. The Austrian letters patent to Gruchala #74,087 of 1916, defendant's exhibit no. 4–4a, is entitled "Memorandum Pad" but inasmuch as this patent was cited by the Patent Office as a reference without demur by applicant, and furthermore because it comprises a container or casing in which the memorandum sheets or disks are housed in the same manner as that of Rulong, it becomes relevant as a proper reference.

The memorandum pad consists of an extensive strip of disk-like members hinged together on opposite sides (see Figs. 4 and 5 below).

Upon these disks the memoranda or information is inscribed. A two-part hinged casing houses the folded disks, and apertures or openings in both members of the container allow an inspection of the outer disks of the memorandum (see Fig. 2).

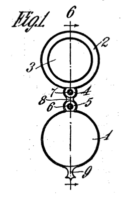
Figures 2, 4, and 5 of the Gruchala patent #74,087 are herewith reproduced:

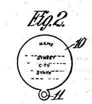


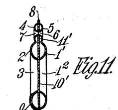


Figures 1, 2, and 11 of the Winans Patent #1,246,369

19. United States letters patent to Winans #1,246,369, defendant's exhibit no. 5, discloses an identification locket of two hinged members both apertured to allow a view of the data carried on a disk or identification card held between the two hinged members, Figs. 1 and 11.







Figures 1, 2, and 11 of the Winans Patent #1,246,369
(Finding 19)

The patentee states in his specification, lines 53 to 58, inclusive, page 2, as follows:

> A card 10′ exactly similar to that shown in Fig. 2, except that it is provided on both sides with the printed

information, is shown in the locket. Thus the information on the card is arranged to be readable from both sides of the locket.

The patentee further states in relation to the identification card held between the apertured halves of the locket, lines 91 to 96, inclusive, page 2:

> It is to be noted particularly that I do not limit myself to a holder for an identification card as obviously any form of card may be employed without departing from the scope and spirit of my invention which is defined in the appended claims.

The Winans patent was not cited by the Patent Office as a reference during the prosecution of the Rulong application.

Figures 1, 2, and 11 of the Winans patent #1,246,369, reproduced herewith, are illustrative of this prior art structure.

20. The prior use of a locket or container of two hinged members, both members provided with openings or apertures through which a view of identification data contained therein, is disclosed and described in the patents set forth in findings 16, 17, and 18.

21. The prior use of disks connected at one edge and adapted to carry identification data or other information, when folded, within a locket or container, which container is provided with openings through which the identification data can be readily seen, is disclosed and described in the patents set forth in findings 16, 17, and 18.

22. The claim in suit is invalid for lack of invention in view of the prior art.

The court decided that the plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The patent in suit describes an identification device which includes two elements—(1) a container and (2) identification data to be placed in the container. The container is described and claimed as a two-part casing hingedly connected and provided with an opening or window on each side adapted to receive a plurality of disk-like members hinged alternately at opposite sides. Such disks may contain suitable identifying information, such as a photograph, name, address, etc., and the disks forming a chart may

be folded one upon another to produce an accordion-like structure capable of extension or of being folded to a small compass.

The two elements of the combination are designed to be made in a compact unit and carried on the person of its owner or in a pocket of the apparel. When the chart is in position within the holder a photograph of the owner appears through a window of one of the part casings and through the window of the other part may be disclosed the name and address. Upon the other face of the connected disks of the chart, inside the casing, may be placed the finger-prints, enlistment dates, or other identifying information concerning the person which it describes. The two members of the container are hinged at one point so that the container may be readily opened and the information therein readily inspected by extending the accordion-like chart (finding 4).

The evidence of record clearly shows that plaintiff's patent is invalid for lack of invention (finding 22) for the reason that every element of the single claim of the patent has been met by disclosures in prior patents set forth and described in findings 16, 17, and 18. These patents disclose that it was old for more than two years prior to May 18, 1932, the filing date of the patent in suit, to provide a two-part casing hinged together to contain an extensible memorandum pad or chart of a plurality of disk-like members hinged alternately at opposite sides, which chart or pad may contain identifying information, photographs, and in connection with which the casing is provided with exposure openings on both faces to exhibit indicia on the pad memorandum disk next to such openings.

The evidence also establishes, and we have found as a fact (finding 12), that the Certificates of Identification and the Continuous Discharge Book used by the defendant, and alleged by plaintiff to constitute an infringement of the Rulong patent, do not respond to claim 1 of the patent in suit. Plaintiff contends that this finding is erroneous and that a finding of infringement should be made for the reason that the Certificates and Discharge Books were used by the defendant for the same purpose as intended by the patent in suit. But the claim of the patent, if valid, cannot be thus

broadly construed. The claim must be limited to the device or structure specified in the claim. The patent statute requires a patentee to specify and point out the parts which he claims to be new, and in *White* v. *Dunbar*, 119 U. S. 47, 52, the court said: "The claim is a statutory requirement, prescribed for the very purpose of making the patentee define precisely what his invention is; and it is unjust to the public, as well as an evasion of the law, to construe it in a manner different from the plain import of its terms." The claim of the patent in suit, even if valid, is specific in scope and very limited. There is no part of any element set forth in the claim of the patent in suit in any of the defendant's structures. The devices are not similar; they are not operated or used in the same manner; and there is no feature of similarity, except for the fact that both the patent in suit and the defendant's Continuous Discharge Book provide means for the reception of a photograph, a thumbprint, and descriptive matter of the owner. However, the Continuous Discharge Book used by the defendant more nearly resembles the books shown in prior patents (finding 16) than any feature of the device shown in the patent in suit.

Plaintiff also contends that the prior patents offered in evidence by the defendant should be excluded and no findings made with reference thereto for the reason that they were incompetent as evidence because they did not contain, when offered in evidence, the Letters Patent Certificate of the Commissioner of Patents and the seal of the Patent Office. But this was not necessary to make prior art patents competent evidence. The prior art patents offered and received in evidence show when they were filed and granted, and they were so offered and received in evidence under a stipulation of the parties, that certification thereof was waived.

Plaintiff is not entitled to recover, and the petition is dismissed. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

Reporter's Statement of the Case

FRANZ J. JONITZ v. THE UNITED STATES

[No. 43996. Decided May 29, 1939]

On the Proofs

Property of Army officer lost, damaged, or destroyed.—Where Army officer, on duty at Jeffersonville Quartermaster Depot, Jeffersonville, Ind., occupied a house in Jeffersonville because public quarters were not available, and he was paid rental allowance for said quarters, and where by proper orders he was on duty during the time the Ohio river was in flood, January 1937, and was engaged in saving human life and the property of the United States, it is held that under the Act of March 4, 1921, he is entitled to recover for loss and destruction of his own property in said house by the flood.

Same.—The cases of *Andrews*, 52 C. Cls. 373; *Curran*, 65 C. Cls. 26, and *Morrison*, 87 C. Cls. 606, distinguished.

Same; meaning of "in military service."—The requirement of the statute that the loss of personal property shall be "in the military service" was met in the instant case since plaintiff was engaged (1) in saving human life, (2) in saving Government property and (3) in military duties in connection with the disaster which caused the loss of his personal property.

Same.—Where plaintiff's property was not in public quarters, to which he was entitled under the law, because public quarters were not available, it is held that the requirement of the Act that the private property be "in the military service" was met. *Purssell*, 46 C. Cls. 509, cited.

Same; location of property.—The act contains no language which can be construed as meaning that unless the property is within the boundaries of a Government reservation it is not in the military service.

Same.—It is held that in the Act Congress did not intend that officers whose property is lost while stored in public quarters shall be compensated, but that officers whose property is lost while stored in private quarters, when no such public quarters are available, shall not be paid, when it is affirmatively shown that the officer was on duty under the conditions prescribed by the Act.

Same.—The criterion is the character of the property, the conditions under which it is lost and the assignment of the officer at the time; not where the property is located.

The Reporter's statement of the case:

Mr. Mahlon C. Masterson for the plaintiff. *Ansell, Ansell & Marshall* were on the briefs.

Miss Stella Akin, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant.

The court made special findings of fact as follows:

1. The plaintiff, Franz J. Jonitz, at all times hereinafter mentioned was an officer on active duty in the Quartermaster Corps, in the Regular Army of the United States with the rank of Captain. He was promoted to Major November 1, 1937.

2. By Special Orders No. 118, dated May 18, 1936, plaintiff was assigned to duty at Jeffersonville Quartermaster Depot, Jeffersonville, Indiana, as assistant for procurement planning, and remained on duty at that place from the date of the assignment to the present time.

3. During the period in question plaintiff occupied a house at 723 East Maple Street, Jeffersonville, Indiana. Public quarters were not assigned to him for the reason that there were none available, and he was paid rental allowance and compelled to provide for his own quarters at his own expense.

4. On or about January 21, 1937, the Ohio River was at flood stage at Jeffersonville, Indiana. By orders of his commanding officer, telephoned to the plaintiff at his quarters on January 21, 1937, he reported at 9 P. M. for duty at the Jeffersonville Quartermaster Depot, and remained on duty under such orders continuously throughout the period of the flood, namely, from January 21 to January 31, 1937, for the purpose of saving human life and United States Government property. He had no reason to believe at the time he left his quarters for duty under such orders that his own property was in danger of being destroyed. His duties under such orders prevented him from ascertaining the condition of his own property until 12 or 15 days after the beginning of the flood, when, taking advantage of the first opportunity to go to his quarters, he found there was approximately 15 feet of water in the house occupied by him and his family, which remained there about 14 days. While so engaged in authorized military duties, and in consequence of his having given his attention to the saving of human life and property belong-

ing to the United States, plaintiff's private property, namely, furniture and household goods, were damaged or destroyed, without fault or negligence on his part.

5. By letter dated April 16, 1937, under provisions of A. R. 35-7100, War Department, of October 10, 1929, plaintiff requested that he be reimbursed for the loss of furniture and household goods as aforesaid, as per list of articles submitted with his claim showing quantity of each with original price in each case, estimated cost of replacement for each article, approximate date of purchase, length of time articles had been used, together with condition and value at time of loss. The amount so claimed was $778.50.

6. By Special Order, No. 22, dated April 19, 1937, under the provision of Paragraph 2 of A. R. 35-7100, War Department, and the Act of March 4, 1921, a board of officers was appointed for the purpose of investigating and making recommendations as to plaintiff's claim for reimbursement for loss of furniture and household goods during the Ohio River flood, which occurred during the period from January 21 to January 31, 1937, which Board, after a thorough investigation, found that while plaintiff was on military duty during the emergency at the Jeffersonville Quartermaster Depot for the purpose of saving human life and United States Government property, his own personal property was damaged by the action of the flood waters; that he was not responsible for the catastrophe and that the damage to his property was without fault or negligence on the part of plaintiff, and recommended that he be reimbursed for such loss in the sum of $618.50.

The findings and recommendations of the Board are as follows:

> The Board finds that on or about January 21, 1937, the Ohio River was in flood stage, that its water reached and entered the home of Captain Jonitz at 723 East Maple Street, Jeffersonville, Indiana; that Captain Jonitz had been ordered by the Commanding Officer, Jeffersonville Quartermaster Depot, to remain on duty continuously during the emergency at the Jeffersonville Quartermaster Depot for the purpose of saving human life and U. S. Government property; that while so engaged his own personal property was damaged by the

Reporter's Statement of the Case

action of the flood waters; that Captain Jonitz was not responsible for the catastrophe and that the damage to his property was without fault or negligence on the part of Captain Jonitz; the list of articles damaged and the amount of damage to each as determined by the Board follows:

Quantity and Article	Estimated Value by Board	Salvage Value Estimated by Board	Reimbursement Recommendation by Board
1 Table, 6 Chairs, 1 Buffet (Dining Room Furniture)	$75.00	[1] $1.50	$73.50
1 Piano—P. A. Starck, upright	260.00		260.00
1 Piano bench	5.00		5.00
2 Mattresses, cotton, single	10.00		10.00
2 Wicker chairs	8.00		8.00
1 Desk, library, mahogany finish	10.00		10.00
1 Chair, leather (living room)	7.50		7.50
2 Chairs, library (inlaid)	12.50	.50	12.00
2 Settees, mahogany finish	10.00	None	10.00
1 Bed, mahogany, solid	15.00		15.00
1 Dresser, oak	5.00		5.00
1 Mirror, 2′ x 3′	2.00		2.00
1 Table, mahogany finish, drop leaf	5.00		5.00
1 Magazine rack	1.00		1.00
3 Small Rugs, 2′ x 4′, hooked	4.00		4.00
1 Typewriter table	2.00		2.00
1 Table, porcelain, enamel top	4.00	None	4.00
1 Cupboard, utility	3.00		3.00
3 Tennis rackets	3.00		3.00
1 Bedspread, double bed	2.00		2.00
3 Blankets, wool, double	10.00		10.00
2 Pillows, feather	2.00		2.00
1 Stepladder, size, 6-ft	1.50		1.50
3 Porch chairs, folding, canvas	3.00		3.00
1 Table pad, w/leaves, diameter 5-ft	8.00		8.00
1 Electric fireless cooker, automatic control	$6.00		$6.00
Miscellaneous Draperies and curtains	10.00		10.00
280 Books (Professional and personal)	[2] 140.00	$14.00	126.00
Repairs to electric refrigerator (Kelvinator) including baking out of motors, drying, etc	10.00		10.00
Totals	634.50	16.00	618.50

[1] 6 chairs.

[2] The 280 books consist of the following: 7 Vol. History of World War, approximate cost. $85.00; 13 Vol. Kipling's Books, approximate cost, $24.50; 2 Vol. Forward March. approximate cost, $30.00; remainder individual copies, cost, each, $1 to $1.50.

That the Board saw only the—

1 Settee
6 Chairs, dining
1 Table, porcelain enamel top
2 Chairs, library
Miscellaneous draperies, books, and curtains;

that the remaining articles had been thrown out and hauled away by the clean-up sanitation crews; that those items which were thrown away had been disposed of prior to filing of this claim, making them unavailable

for examination of this Board; that the receipt for repairs to the electric refrigerator (Kelvinator) was exhibited to the Board; that repairs requested of local Quartermaster had been made; that there was no collectible insurance; that in the opinion of the Board all of the articles, for which allowance is recommended by the Board, were moderate in numbers, reasonable in price, were needed, and were appropriate to the use of the claimant.

The Board recommends that recoupment to the amount of six hundred and eighteen dollars and fifty cents ($618.50) be paid to Captain Franz J. Jonitz, Q. M. C.

7. The Board in its report stated that the property of the plaintiff destroyed by the action of the flood waters was not covered by insurance, and that the property, the reimbursement for the loss of or damage to which was recommended therein, was required to be possessed and used by the plaintiff or was reasonable, useful, necessary, and proper for the plaintiff to have in his possession in the public service in the line of duty, while in quarters, or in the field; that the damage occurred without fault or negligence on the part of the plaintiff, and falls within the provisions of Paragraph 2 of Section 1 of the Act of May 4, 1921; and that the amount recommended for the reimbursement of the plaintiff represents the reasonable value of the property so lost or damaged.

The report reads as follows:

We, the undersigned Board of officers, convened under the provisions of Finance Office memorandum #104, February 26, 1937, report that we met on the day of October 20, 1937, and then and there examined into the claim of Captain Franz J. Jonitz, Q. M. C., made under the provisions of the Act of March 4, 1921, 41 Stat. 1436, amending the Act entitled "An Act to provide for the settlement of claims of officers and enlisted men of the Army for loss of private property destroyed in the military service of the United States, etc."; that the claim and the evidence taken and submitted in connection therewith are hereto attached, and we therefrom have ascertained and determined as follows: That on January 21, 1937, the Ohio River was in flood stage; that its water reached and entered the home of Captain Jonitz at 723 Maple Street, Jeffersonville, Indiana; that Captain Jonitz had been ordered by his commanding officer, Jef-

Reporter's Statement of the Case

fersonville Quartermaster Depot, to remain on duty during the emergency at the Jeffersonville Quartermaster Depot for the purpose of saving human life and property belonging to the United States; and that while so engaged his own personal property located in his home was damaged by the action of the flood waters; that the damaged property had a salvage value of $16.00; that the damage was not covered by insurance; and that the local Quartermaster was unable to make repairs of the articles which were not destroyed.

The Board further finds that the property, the reimbursement for the loss of or damage to which is recommended herein was required to be possessed and used by the claimant or was reasonable, useful, necessary, and proper for the claimant to have in his possession in the public service in the line of duty, while in quarters, or in the field; that the loss or damage occurred under the circumstances ascertained and determined as set forth above, without fault or negligence on the part of the claimant, and falls within the provisions of paragraph 2 of Section I of the Act of March 4, 1921; that none of the items can be replaced in kind from Government property on hand, except as indicated on the attached list; and that the amount recommended for the reimbursement of the claimant for loss of or damage to each and every article represents the reasonable value of the property so lost or damaged, as shown on attached list.

* * * * *

Quantity	Description	Value Claimed	Value Determined	Disallowance	Reasons
1	Table, Dining Room	$75.00	$73.50*	$1.50	Red. by Loc. Bd.
6	Chairs, Dining Room				
1	Buffet, Dining Room				
1	Piano, P. A. Starck	300.00	260.00*	40.00	Do.
1	Piano Bench	5.00	5.00*	----------	
2	Mattresses	10.00	10.00*	----------	
2	Chairs, Wicker	10.00	8.00*	2.00	Do.
1	Desk, Library	10.00	10.00*	----------	
1	Chair, leather, Liv. R.	10.00	7.50*	2.50	Do.
2	Chairs, Library (inlaid)	15.00	12.00*	3.00	Do.
2	Settees, Mahogany finish	20.00	10.00*	10.00	Do.
1	Bed, Mahogany, solid	15.00	15.00*	----------	
1	Dresser, Oak	7.00	5.00*	2.00	Do.
1	Mirror 2′ x 3′	2.00	2.00*	----------	
1	Table, Mahogany finish, drop-leaf.	10.00	5.00*	5.00	Do.
1	Magazine Rack	2.00	1.00*	1.00	Do.
3	Rugs, small, hooked 2′ x 4′	4.00	4.00*	----------	
1	Desk, Typewriter	3.00	2.00*	1.00	Do.
1	Table, porcelain top	4.00	4.00*	----------	
1	Cupboard, Utility	3.00	3.00*	----------	
3	Tennis Rackets	7.00	3.00*	4.00	Do.
1	Bedspread, double bed	2.00	2.00*	----------	
3	Blankets, Wool, double	10.00	10.00*	----------	
2	Pillows, Feather	2.00	2.00*	----------	

*Denotes replacement.

Quantity	Description	Value Claimed	Value Determined	Disallowance	Reasons
1	Stepladder, size 6-ft	1.50	1.50*		
3	Porch chairs	4.00	3.00*	1.00	Do.
1	Table pad w/leaves—5′ diameter.	8.00	8.00*		
1	Fireless Cooker, Electric automatic control.	9.00	6.00*	3.00	Do.
	Miscellaneous Draperies and Curtains.	10.00	10.00*		
280	Books (Personal and professional).	210.00**	126.00*	84.00	Do.
	Repairs to electric refrigerator (Kelvinator) including baking out of motors, drying, etc.	10.00	10.00		
	Total	778.50	618.50	160.00	

*Denotes replacement.
**The 280 books consist of the following: 7 Vols. History of World War, $85.00; 13 Vols. Kipling's Books, $24.50; 2 Vols. Forward March, $30.00; and individual copies from $1 to $1.50.

8. By letter dated October 29, 1937, from the Office of the Chief of Finance the plaintiff was advised that the Board recommended payment in the amount of $618.50 for the loss of or damage to his property, with the comment that from a preliminary review it would appear that the recommendation was just and equitable; and that if satisfied with the award the original report of the Board forwarded to him should be signed and returned to that office for payment. Accordingly, plaintiff signed and forwarded the report to the office of Chief of Finance, and that office by letter dated November 4, 1937, advised the Secretary of War that the Board of Officers convened in the office of the Chief of Finance considered the claim and recommended that the plaintiff be reimbursed in the amount of $618.50.

9. The claim was examined into and determined by the Assistant Secretary of War under authority of the Act of Congress approved March 4, 1921, *supra*, as construed by the Comptroller General in his decision dated September 29, 1931, and was approved by the Assistant Secretary of War with respect to both amount and facts of the loss.

The certificate of the Assistant Secretary of War, dated November 5, 1937, reads as follows:

> It is hereby certified that the articles of property, in the items and values as found by the Board were reasonable, useful, necessary, and proper for the claim-

ant to have in his possession in the public service in the line of duty, while in quarters, or in the field, that the loss occurred under the circumstances ascertained and determined by the Board and without fault or negligence on the part of the claimant and that none of the items can be replaced in kind from Government property on hand. The value is hereby, under the provisions of the Act of Congress of March 4, 1921 (41 Stat. 1436) ascertained and determined in the amount recommended by the Chief of Finance, and the claim in such amount is approved.

Sgd: LOUIS JOHNSON,
Louis Johnson,
The Assistant Secretary of War.

10. The claim or any part thereof has not been paid for the reason that the Comptroller General in an advance decision held that the loss in question is not within the provisions of the statute.

The court decided that the plaintiff was entitled to recover.

BOOTH, *Chief Justice*, delivered the opinion of the court:

The agreed statement of facts herein shows that plaintiff, an Army officer, was on duty at Jeffersonville Quartermaster Depot, Jeffersonville, Ind.; that he occupied a house in Jeffersonville because public quarters were not available, and was paid rental allowance therefor. By proper orders, plaintiff was on duty continuously during the time the Ohio River was in flood, and, as found by the War Department, was engaged in saving human life and property of the United States. While so engaged in such military duties his own property, which was "required to be possessed and used by plaintiff or was reasonable, useful, necessary, and proper for the plaintiff to have in his possession in the public service in the line of duty while in quarters or in the field," was lost or destroyed. Plaintiff asserted a claim of $778.50, and the Board appointed by the Secretary of War recommended the allowance of the sum of $618.50, which recommendation was approved by the Secretary of War.

This suit is to recover the sum so approved, under the provisions of the act of March 4, 1921, 41 Stat. 1436. The Comptroller General held that under the conditions recited

the property was not lost "in the military service" and denied plaintiff's claim. Defendant cites the cases of *Andrews*, 52 C. Cls. 373; *Curran*, 65 C. Cls. 26; and *Morrison*, 87 C. Cls. 606.

The *Andrews case* involved the loss of a horse. That case was decided upon the fact that the horse's death could not be attributed in any way to the military service. After reciting the cause of the horse's death, and referring to vicious, high-strung horses brought into the military service and the likelihood of mortality in such cases, the court comments as follows:

> The term "in the military service" has a settled and universally accepted legal meaning and would not appear in the act if it was not designed to limit liability for the loss and destruction of private property occurring by reason of and in the actual performance of military duty. * * * There is absolutely nothing in the record to connect the injury with military service. * * * The one indisputable fact, apparent and conceded, is that the horse was turned out to graze and while so engaged can not be said to be in the military service [p. 384].

The case of *Curran*, *supra*, involved the loss of personal property under the act of March 4, 1921, *supra*, the act in controversy in the instant case. Curran being ordered to overseas duty delivered his household goods to a quartermaster for packing and storing. Upon his return to this country it was discovered that one box containing these goods was missing. It did not appear how the loss occurred. The court held that the officer could not recover because (1) the property lost did not come within the meaning of the provisions of the statute which define the class or character of property for the loss of which payment may be had; and (2) because it was not shown that at the time of such loss plaintiff "was engaged in authorized military duties in connection therewith." The court, however, did make the following comment:

> If the court should hold that the contention of plaintiff in this case is correct it would result in committing the Government to the principle of insurance against the loss of private property stored without charge in a

Opinion of the Court

Government warehouse and lost by the negligence of the Government's agent in charge of such property, which was never the intention of Congress.

In the case of *Morrison*, *supra*, the property was in the officer's quarters on a Government reservation and was destroyed by fire at a time when plaintiff was on duty elsewhere in connection with the convening of a board of investigation. The court held against the officer because at the time of the loss he was neither engaged in saving human life or Government property nor in authorized military duty in connection with the event which caused the loss. The court, commenting upon the holding in the *Curran case*, *supra*, that the words "in connection therewith" in the statute meant in connection with the property so lost, said (p. 610), "we believe that the court could have gone further and not restricted this meaning to the loss of the property of an officer but to the catastrophe or event which produced and which was the cause of the loss."

The case of *Purssell*, 46 C. Cls., 509, was brought under the act of March 3, 1885, 23 Stat. 350, which provided, among other things, for the reimbursement of Army officers whose private property was destroyed "without fault or negligence" on their part, and where loss was "in consequence of his having given his attention to the saving of the property belonging to the United States which was in danger at the same time and under similar circumstances."

It appears in this last-mentioned case that before the officer's departure on leave he packed his personal property and stored it in his office room in charge of a clerk in an office building in San Francisco. While on leave the property was destroyed by earthquake and fire. The claim was disallowed by the Auditor for the War Department because at the time the officer was not engaged in saving Government property but was absent on leave. Judgment was given plaintiff on the ground that under the statute the officer's absence on leave at the time of the loss of his military property would not exclude him from the relief given by the statute if the loss or destruction was without fault or negligence on his part. The act of 1885 granted relief to men in the military service for private property "lost or

destroyed in the military service." In giving judgment in this case, therefore, the court must have determined that property stored in an office building was "in the military service."

In the cases mentioned, both under the act of 1885 and the act of 1921 the statute required the loss to be "in the military service," yet there seems to have been no contention in any one of them concerning this language. In the instant case the plaintiff met the requirement of the statute in all particulars; i. e., (1) he was engaged in saving human life; (2) he was engaged in saving Government property; and (3) he was engaged in military duties in connection with the flood which caused the loss herein (*Morrison case, supra*).

The sole defense in the case is that because the property was in a private building and not on Government property in public quarters it was not "in the military service" within the meaning of the act. We think the act is directed to such occasions where plaintiff, being by orders stationed elsewhere, is unable to give his personal attention to the saving of his own property. Under the facts in this case it would have made no difference whether he was on duty elsewhere or with his property, so far as saving of the property was concerned. The loss was caused by an unprecedented rise in the Ohio River, over which plaintiff had no control, and in view of the known facts in connection with this flood it is obvious that his presence with his property could not have resulted in preventing the loss.

Plaintiff's property was not in public quarters because there were no public quarters available, which necessitated his renting quarters outside the reservation, for which he was paid commutation. The contention that because the property was not on the reservation it was not "in the military service" not only conflicts with the *Purssell case*, where the property was in an office building at the time of the earthquake and fire, but it ignores the obvious fact that plaintiff's property was in private quarters because public quarters, to which he was entitled under the law, were not available for the purpose.

When is property "in the military service"? A number of situations readily come to mind where property of an

Army officer must of necessity be elsewhere than in public quarters. The act itself contains no language which can be construed as meaning that unless the property is within the boundaries of a Government reservation it is not in the military service.

The Secretary of War in this case certified that the articles of property were reasonable, useful, necessary, and proper for plaintiff to have in his possession in the public service in the line of duty, while in quarters or in the field; that the loss occurred without fault or negligence of the plaintiff; and that the amount recommended by the Chief of Finance is approved and certified for payment. The Comptroller General, however, disagreed with the Secretary of War and held that "Where the officer is residing in a civilian community and the household goods are lost in a common catastrophe, affecting all residents alike in the same vicinity, there is no authority to reimburse the owner from appropriated funds as for a loss or destruction of his goods in the military service."

From the *Morrison case* it appears that the act requires that before plaintiff can obtain relief it must be affirmatively shown that he was on duty under the conditions prescribed, and if he qualifies in that respect he is entitled to compensation. It does not seem possible to read into the act a meaning that Congress intended that officers whose property was lost while stored in public quarters should be compensated, but that officers whose property was lost while stored in private quarters, when no such public quarters were available, should not be paid. If the property was "in the military service" in the one case it certainly was in the other. We think the criterion should be the character of the property, the conditions under which it was lost, and the assignment of plaintiff at the time, not where the property was located. The plaintiff is entitled to recover. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and GREEN, *Judge*, concur.

Opinion of the Court

JOHN MORRELL & COMPANY, A CORPORATION v. THE UNITED STATES

[No. 44569. Decided May 29, 1939]

On Motion to Dismiss

Agency of the Government.—Where plaintiff entered into certain contracts with the Federal Surplus Relief Corporation, a Delaware corporation created under authority granted to the President by the provisions of the National Industrial Recovery Act, and continued by subsequent congressional enactments, it is held that the corporation is an agency of the Government.

Same.—The *Algoma Lumber Co.* case, 305 U. S. 415, is distinguished.

Same; undisclosed principal.—Where the contract itself did not disclose the fact that the United States was the principal, and the corporation was merely the agent, this is held to be immaterial.

Same.—The statutes and the purpose for which the corporation was organized disclosed the agency.

Same.—When an agent, being duly authorized, acts on behalf of an undisclosed principal, the right of the other party to a contract to enforce the contract against the undisclosed principal is well settled.

The Reporter's statement of the case:

Mr. Warren H. Wagner for the plaintiff.

Mr. G. C. Sherrod, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant. *Mr. Paris Houston* was on the brief.

GREEN, *Judge*, delivered the opinion of the court:

The defendant has moved to dismiss the action of plaintiff alleging that the petition shows, upon its face, that there is no cause of action stated against the United States of America. Since the motion was filed, the petition, pursuant to an order of court, has been amended and the parties have agreed that the motion to dismiss may be treated as applicable to the amended petition and the case submitted on the pleadings as they now stand and the arguments filed by the respective counsel. It will be observed that the motion is in effect a demurrer and it will be so treated.

The suit is based on an alleged breach of four contracts executed by the plaintiff, John Morrell & Company, a corporation, and the Federal Surplus Relief Corporation, a private corporation organized and existing under and by virtue of the laws of the State of Delaware. The petition alleges that the Federal Surplus Relief Corporation was created under authority granted the President by the provisions of the National Industrial Recovery Act approved June 16, 1933, was recognized and continued as an agency of the United States by subsequent congressional enactments, and that the title to the corporation was changed to Federal Surplus Commodities Corporation on November 18, 1935. It is further alleged that this corporation at all times has been an agent of the United States acting for and on behalf of the United States, with authority to bind the United States by contract, and that the object and purpose of the corporation, among other things, was to perform the functions which were delegated to it under the acts of Congress pursuant to the National Industrial Recovery Act. (48 Stat. 195.)

The portions of said contracts material to the consideration of defendant's motion are alleged to be identical, differing only in details with reference to the performance thereof.

The main ground of the motion is that the name of the defendant does not appear in the contract nor does the contract, taken as a whole, show that the Federal Surplus Relief Corporation was acting as an agent, or that it was made for and on behalf of the United States. It is therefore urged that the defendant is not bound thereby.

The case of *United States* v. *Algoma Lumber Co.*, 305 U. S. 415, is cited by defendant as holding that those who are parties to and bound by a contract are to be ascertained by an inspection of the document alone. But while some of the language of the opinion, considered apart from the remainder and the facts in the case together with the issues raised thereon, might tend to sustain the contention of the defendant, we think the Supreme Court did not intend to make the conclusion reached in the *Algoma case, supra*, apply to a case like the one at bar. In the case we have before us, not only are the facts entirely different but the nature of the

case, the issues joined, and the questions of law involved are all different. In the *Algoma case* it was claimed that the United States without authority from the Indians, had made a contract for and in their behalf, and plaintiff in the court below sought to apply the well known rule that an unauthorized agent purporting to enter into a contract for a principal is personally liable to the other party. But the Supreme Court held that regardless of whether the Government official who executed the contract for the sale of timberlands owned by the Indians had authority so to do, the contract, which stated it was entered into "between the Superintendent of the Klamath Indian School, for and on behalf of the Klamath Indians * * * and the Lumber Company" imposed no obligation on the United States.

It will be observed that in the *Algoma case* it was claimed first that the Government was a party to the transaction which was carried out under its laws by one of its officials, and that it was a case where the Government in the execution of the contract acted as agent for the Indians without authority. In the case now before us, no question is raised as to the authority of the Federal corporation to make the contracts in question but it is claimed it was acting on behalf of and as an agent for the United States. In the *Algoma case*, the plaintiff sought to show that the Government acted as an unauthorized agent. In the case now before us, the plaintiff undertakes to show that the United States was in fact the principal and the Federal corporation involved was merely acting as its agent. Nothing that was said in the opinion in the *Algoma case*, *supra*, can apply to the case now under consideration.

The contract itself did not disclose the fact that the United States was the principal and the Federal Surplus Relief Corporation was merely the agent, but this is immaterial. The statutes and the purpose for which the corporation was organized disclosed the agency, and, moreover, when an agent being duly authorized acts on behalf of an undisclosed principal, the right of the other party to a contract to enforce the contract against the undisclosed principal is too well settled to need any citation of au-

thorities. But see section 248, vol. 3, C. J. S., p. 175, note 6, citing cases holding that a person contracting with an agent or an undisclosed principal may hold either the agent or, upon discovery, the principal.

The motion to dismiss the petition must be overruled and it is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

ORLEANS DREDGING COMPANY v. THE UNITED STATES

[No. 41951. Original decision March 7, 1938. Order and Memorandum May 29, 1939]

In the above case, May 29, 1939, the following Order and Memorandum Per Curiam were filed:

ORDER

Plaintiff's motion for new trial is overruled.

The second motion of defendant for a new trial on the ground that there is a miscalculation involved in the judgment entry of the amount of material which went into the old riverside borrow pits in the process of constructing the riverside enlargement of the levee between stations 1998 and 2067 having been fully submitted upon the evidence taken pursuant to the former order of the court, it is now ordered that the defendant's motion for new trial be sustained insofar as to strike from Finding 17 the fourth paragraph thereof, to strike from Finding 24 the last paragraph, and insert in lieu of the said last paragraph of Finding 24 the following:

> The aggregate of 1,172,560 cubic yards of material pumped from Pits C and D was not accepted by the Government either as fill or as false berm, and 669,647 cubic yards thereof went into old riverside borrow pits that were used in the construction, restoration, or enlargement of the old cut-off levee between stations 1998

and 2067 before the commencement of any work by the plaintiff herein. The remainder, 502,913 cubic yards went into more distant borrow pits or other depressions whose connection with the cut-off levee or reasonable proximity thereto is not established, or was otherwise dissipated, and its allocation to these several destinations does not appear. The plaintiff has not been paid for the material which went into the old riverside borrow pits as above stated.

The former judgment is set aside and pursuant to the change in the findings a new judgment will be entered in favor of plaintiff for $237,523.79. A memorandum is filed in explanation of this order.

MEMORANDUM

Per Curiam:

Pursuant to the order of court new testimony was presented in support of the second motion of defendant for a new trial. This evidence was heard by a commissioner of this court and he has made his report thereon. The parties to the case, through their respective counsel, each filed exceptions to this report, but upon reexamination of the evidence we think it is substantially correct. The report shows that the amount of material pumped by the plaintiff which went into the old riverside borrow pits and was not paid for by the Government had been miscalculated upon the testimony originally introduced in the case. Defendant's motion for a new trial on the ground of a miscalculation has accordingly been sustained insofar as to enter an order correcting the figures stated in the original findings and used in the calculation of the amount of this material. An examination of this order will show that the changes made in the findings do not affect any of the legal questions decided in the original opinion but merely the amount of plaintiff's recovery under Claim 6 [Paragraph X½ of the petition]. It is not therefore necessary to make any change in the opinion except to correct the calculation of the plaintiff's recovery and the amount of judgment to be rendered. The new Finding 24 shows that the correct amount of ma-

terial which went into the old riverside borrow pits was 669,647 cubic yards, which at the contract price of 35.47 cents a cubic yard, amounts to $237,523.79. The former judgment has been set aside and a new judgment entered in favor of plaintiff for the amount last stated.

More than thirty days after the filing of the exceptions to the commissioner's report and after all time had expired for further filings, whether the proceedings were treated as on motion for new trial or under the rules applied to original hearings, defendant's counsel presented to the court in typewriting a long brief on remand. Some peculiar circumstances not necessary to be recited here have induced us to permit this brief to be filed and, being filed, it should be and is considered. Part of this last brief is based upon the ground that the actual capacity of the borrow pits was not sufficiently shown by the evidence. It may be conceded that it could not be shown exactly, but this does not prevent plaintiff's recovery. The commissioner had no difficulty in determining an amount which we think is substantially correct and we have followed his findings although plaintiff's counsel insists that the amount which he found is much too small and defendant's counsel insists that it is altogether too large.

The greater portion of defendant's last brief is devoted to an effort to show that the agents of plaintiff and defendant did not understand that the provision of the contract upon which plaintiff has been granted a recovery was to be carried out; and, assuming that this appears from the testimony, it is contended in effect that the contract is to be treated as if this provision were not a part thereof. Cases are cited in support of the familiar rule that where the terms of a contract are ambiguous or the language of a provision is not plain and is capable of more than one construction, parol testimony may be considered to show the understanding of the parties as to what in fact the contract was between them. But here the language of the contract is clear, definite, and positive. In fact, as we stated in the original opinion, it is much plainer than with reference to most of the matters in controversy in the case. The important part of the provision in question was, as shown in the original opinion, a note attached to the contract drawing, and the contract

itself required the work to be strictly in accordance with the specifications and drawings. It may be that plaintiff's engineer or agents had not noticed this provision and were not aware of it. Plain agreements in a contract are not to be nullified on account of some oversight or even by a misunderstanding. They can only be taken out by another agreement. The rule which defendant invokes has no application here and on this third argument by defendant our former conclusion is reaffirmed.

The equities of this case are strongly with the plaintiff. By unreasonable and unnecessary requirements on the part of the Government officials the plaintiff was compelled to do far more work than was required by the contract. The defendant has sought to defeat plaintiff's recovery by every technicality that could possibly be urged and unfortunately the nature of plaintiff's work was such that it was impossible to show how much more was performed than was necessary. The case has been drawn out to great length by hearing and rehearing until we think no further proceedings should be had except to enter judgment.

FINDINGS AND ORIGINAL OPINION

The findings, amended as shown, together with the original opinion in the case, March 7, 1938, are as follows:

SPECIAL FINDINGS OF FACT

1. Orleans Dredging Company, the plaintiff herein, is a corporation of the State of Louisiana, with its principal office and place of business in the City of New Orleans.

2. On August 22, 1929, plaintiff entered into a contract with the United States, represented by John C. H. Lee, Major, Corps of Engineers, District Engineer, as contracting officer, whereby plaintiff agreed, as the contract recited, to—

> * * * furnish all labor and materials, and perform all work required for the construction of landside enlargement, Stations 1850–1998 and 2065–2190, inclusive, and riverside enlargement, Stations 1998–2065, inclusive, of Beulah to Lake Vermillion levee, on the left

bank of the Mississippi River, material to be placed under *alternate method* as described in paragraph 39.1 of the specifications, subproject item No. 8, requiring about two million four hundred thousand (2,400,000) cubic yards of earthwork, more or less, for the consideration of thirty five and forty seven hundredths (35.47) cents per cubic yard, making a total consideration of approximately eight hundred fifty-one thousand two hundred eighty dollars ($851,280.00), in strict accordance with the specifications, schedules, and drawings, all of which are made a part hereof and designated as follows:

Specifications for levee work dated June 22, 1929, numbered 1 to 39.8 and attached hereto. Drawing No. 3 showing the work and method of construction, and two sketches of alternate method, one for riverside enlargement, 60% complete, and one for landside enlargement, 70% complete, also attached hereto.

The contract provided that the work was to commence within 20 calendar days after the date of receipt by the contractor of notice to proceed, and be completed within 18 calendar months after the said date of receipt.

A copy of the contract is attached to the petition as plaintiff's exhibit C and is made part hereof by reference.

The "alternate method" required by the contract was described in subproject item No. 8 of paragraph 39.1 as

placing * * * the required yardage hydraulically in any approved manner, but not necessarily up to grade, provided fill is placed on ground cleared of all timber and grubbed of all stumps and for stations 1850–1998 and 2065–2190 within the landside toe of the new levee prism and, for stations 1998–2065, inclusive, within 350 feet riverward from the center line of the existing levee.

Subproject item No. 8 further provided:

In placing the material hydraulically, slopes shall be made continuous and away from the levee and in no case shall pockets of water be permitted to remain between the center line of the levee and the outer limits of the hydraulic fill.

Bidders on alternate proposals shall submit sketches and descriptions of method proposed to be followed, including provision for drainage; which shall become part of the contract, if contract is made.

Among other provisions in the contract specifications were the following:

> 13. *Right of way and material.*—This agreement is made with the understanding that the right of way and earth for constructing the levee will be furnished by the United States * * *.
>
> 22. * * * In the event that the contractor proposes to do the work by hydraulic methods his plan of operation shall be submitted to the contracting officer for approval.
>
> 25. *Borrow pits—General.*—No earth shall be procured from the land side of the levees unless specifically provided for in paragraph 39. The location of borrow pits * * * will be designated by the contracting officer for each section of work advertised, and will be a part of the information furnished prospective bidders. When shown on maps or profiles submitted to bidders that earth cannot be obtained opposite stations it must be hauled from places designated without extra compensation.

Both parties to the contract employed men who had had some experience in the hydraulic handling of earth; that is to say, the dredging, transportation, and deposit of earth moved by a hydraulic process. But it does not appear that extensive use had been made under varying conditions of hydraulic methods in furnishing a foundation for a levee.

The main problem in the work was the placing of the material pumped in the fills so that unsuitable material would not be deposited. It appears that the deposit of material in the fills may be largely controlled by the use of settling basins, spillways, baffleboards, etc., which were used by the plaintiff, sometimes in accordance with directions received from defendant and sometimes contrary to its directions. However, the evidence fails to disclose any approved method of controlling the placing of material by the use of such means. There is nothing in the testimony to show any rule or established practice in this respect but it does appear that different material required different methods. This was the case particularly with buckshot. The so-called buckshot as it lay in the borrow pits, to be hereinafter mentioned, was suitable for levee construction, but as shown in a subsequent finding it was so disintegrated in dredging as

to present a problem as to how its suitability for levee purposes could be preserved when it was placed in the fill. The Government engineers had been working on this problem but had not solved it at the time the contract work was being done, and the contract specifications did not aid in the determination of how a deposit from buckshot could be placed in the fills in a satisfactory condition for levee purposes after it had been dredged and transported hydraulically.

3. As information furnished prospective bidders the plaintiff in due course had received from the United States Engineer Office at Vicksburg, Miss., by Major John C. H. Lee, District Engineer (the contracting officer) a notice to contractors dated April 4, 1929, of several projects, to be undertaken, among them the one here in suit, viz, the Beulah-Vermillion levee enlargement, describing it as located 402 levee miles below Cairo, approximate cubic yards 2,400,000, consisting of landside enlargement Stations 1850–1998, riverside enlargement Stations 1998–2065, and landside enlargement Stations 2065–2190, "all material to be procured along the west banks of Lakes Beulah and Vermillion, by hydraulic methods."

Up to and including the date of execution of the contract the aforesaid prospective notice to bidders contained the only designation by the contracting officer of the location of borrow pits for the Beulah-Vermillion section, viz, stations 1850 to 2190, and in the contract itself were incorporated all of plaintiff's plan of operation, sketches, or descriptions of method proposed to be followed, that had been submitted to the contracting officer up to that time.

4. Notice to proceed was received by the contractor September 28, 1929, thereby fixing the time limit for completion March 28, 1931. Work was commenced about October 10, 1929, in the way of preparatory clearing for the riverside enlargement.

5. The two sketches attached to and made part of the contract show the placement of the fill required. There were first to be constructed comparatively small toe levees at the hypothetical toe of the contemplated new levee, the material for the toe levees to be excavated at the toe of the

old (controlling) levee, without disturbing any material in the old levee, the excavation creating a ditch between the toe levee and the old levee. The fill was then to be deposited between the toe levee and the old levee, they acting as retaining walls. Under the hydraulic method of riverside enlargement 60% of the fill was to be within the section or limits of the new levee, and of the landside enlargement, 70%. After the fill had been completed the material so placed by the plaintiff, inclusive of the toe levee, was to be used by the Government for bringing the increased levee to the required grade and section, work that was not included in plaintiff's contract.

The material to be placed by plaintiff was thus to be partly in and partly outside the section of the new levee, was for levee building purposes, and both parties understood that it had finally to be material suitable for levees, except where it was used to fill old borrow pits pursuant to the contract.

Before dredging and filling could be begun the contractor had to construct in advance a sufficient extent of toe levee to retain a progressing fill. The toe levee could not be constructed until the contractor was furnished so-called "construction notes" by the Government. The construction notes gave the dimensions of the fill, the location of the center line and toe of the new levee, and the yardage to be placed, station by station.

A full plan of operations could not be furnished by the contractor before he received construction notes and was assigned the borrow pit or pits from which he was to dredge material for the fill.

The dredge used on the job, except for a short interval not here material, was a Diesel-powered dredge of 24″ pipe capacity, known as the "Diesel," and efficient. The material was dredged with a revolving cutter and with water forced through the 24″ pipe to a point of discharge in a settling basin, between old levee and toe levee, at the far end of which settling basin was raised a crossdike connecting the two levees, short of which there was erected a spillway through the toe levee, of timber, substantial enough and so adapted as to withstand the erosion of water. The spillway

was constructed at the natural ground level and served as an exit for the water coming from the discharge pipe and flowing through the settling basin, and it was necessary that there be placed across it baffle boards in such manner that they could be increased or diminished in height according as the plan was to raise or lower the level in the settling basin. The purpose of the settling basin was to give the earth ejected from the discharge pipe an opportunity to settle, in whole or in part, in contract limits, the nature and quantity of the settlement being due to the kind of material, the velocity of flow, and depth of the water. When the water reached the top of the baffle boards, the rate of discharge thereover about equaled the rate of discharge of water from the discharge pipe, and the raising or lowering of the baffle boards determined the quantity of water kept in the basin for settling purposes. An excessive amount of water kept in the settling basin was known as "ponding."

The full toe levee, built as a retaining wall for the fill in the settling basin, parallel to the existing levee which formed the opposite wall, was on an average about 12 feet high, with a base about 40 feet wide, taking natural slopes, and the ditch from which material was excavated for the toe levee, between location of the toe levee and the toe of the existing levee, was of corresponding cubical dimensions down through the natural surface of the ground.

The spillway having been constructed at the natural ground level, there was formed in the initial discharge into the settling basin, a substantial pond of water, until the rise was sufficient to reach the base of the spillway.

The enlargement of the existing levee from Stations 1850–1998 was known as the upper landside enlargement, being at the northern end of the work and on the landward side of the levee; that from Stations 1998–2065 the riverside enlargement, being riverward of the levee; and Stations 2065–2190, the lower, that is southernmost, landside enlargement. The distance from station to station was 100 feet, making the upper landside enlargement of the existing or controlling levee 14,800 feet, the riverside enlargement 6,700 feet, and the lower landside enlargement 12,500 feet, a total distance of 34,000 feet. 5,000 feet constituted

a levee mile, making the total distance 6.8 levee miles or 6.44 statute miles.

6. On October 22, 1929, the contractor made the following written request of the contracting officer:

> We enclose herewith map of the Beulah-Vermillion Project, in duplicate, showing the right of way for dredge pits which we request be furnished us.
>
> It is our intention to use the material from the Mississippi River to opposite the spur near Station 2180, in making a part of the landside fill opposite Lake Vermillion, and as the material dredged from this portion of the pit will probably be sufficient to take the fill to a point near station 2150, we would then like to move up Lake Vermillion and cut into the west bank of the lake at some satisfactory point to get back into the pit. The amount of material which will be dredged in the lower right-of-way will depend on the stage of the river at the time the dredge commences work. *Our reason for requesting* a large right-of-way around the Beulah Crevasse is so as to enable us to make as large a portion of the fill from *the buckshot ridge*, which lies on the east side of this crevasse hole, as possible. *We have found very good material in Lake Beulah and on the west bank* thereof from opposite station *1900 south and desire the right to dig in the Lake on the west shore as conditions may make advisable*. The material available in Lake Beulah north of station 1900 is not desirable, from our point of view, for the fill and we accordingly request the right to obtain material for the fill from station *1850 to 1900 from the pit shown opposite the lower end of piece number seven, as this material is much better for hydraulic filling*. This pit will not interfere with the work of the contractor on piece seven as his work on this portion of that contract will doubtless be completed by the time we are ready to dredge from this point.
>
> On account of our experience at Rosedale, we have requested more right-of-way for dredge pits than will be needed to complete the work, so that we may change our pit location without additional request, in order to aviod pockets of undesirable material which will be encountered from time to time. This request will not increase the expense of obtaining the right-of-way as we understand that the Levee Board will obtain this right-of-way with an agreement to pay for only that portion that may be used.

We will appreciate your early action on this request so that the work of clearing this right of way may be started as soon as possible.

This letter not having been replied to, a second request was made by the plaintiff November 9, 1929, concluding as follows: "We * * * would ask that you endeavor to arrange for at least that portion commencing at the river and going along Lake Vermillion, so that we can commence the clearing of that portion during the coming week."

November 10, 1929, defendant's area engineer in charge of the work offered the contractor construction notes for 500 linear feet of the job on the lower landside enlargement. For practical purposes 500-foot construction notes were too short, and the contractor objected to them. The offer was limited to 500 feet by the area engineer because defendant's engineers had not yet come to a conclusion as to the length of settling basins they desired, and wished to prevent the contractor from pumping until that question had been decided.

Plaintiff's first dragline was moved on to the job about November 11, 1929, at the lower end of the lower landside enlargement.

On November 12, 1929, plaintiff communicated by letter to the contracting officer as follows:

Referring to the above contract request is made for a decision by the Contracting Officer as to whether the landside enlargement is to conform to the Class C section as shown on drawing Sheet 3 accompanying specifications Serial No. 29/370, or whether this landside fill shall conform to Par. 19 of the general specifications.

We are ready to commence the building of toe levees necessary before filling can commence, and now have our dragline at Station 2190 waiting for construction notes, before we can proceed. Request has been made of the Area Engineer in charge of the Northern Area at Rosedale, for the necessary construction notes, but he advises that he cannot furnish us with notes until he sees the class of material as it is actually pumped into the fill, and he further states that he cannot then furnish us with notes for more than 500 feet of this landside enlargement at one time. Our bid on this alternate project was based on the drawings accompanying the specifications, and on other information furnished us previous to the letting by the Area Engineer at that

time, that the back slope where the landside enlargement was to be made would be made to the "C" section. We contemplated putting in 70% of the required enlargement inside a back slope of 8 to 1, which would allow us to make our fill with a 12 or 15 to 1 slope which is all the available material will take. Any change making the back slope steeper than 8 to 1 will necessitate that we place our fill with a proportionately steeper slope, which we do not believe possible. Further, if the toe distances on the landside slope are varied from station to station in accordance with the material, the toe levees cannot be constructed in advance and the work then cannot proceed.

We have made arrangements to take care of our drainage through the canals adjacent to the work, and in order that this may be done we feel that we should at least be allowed to construct these toe levees far enough in advance to accomplish this purpose and to insure that the dredge will not be delayed by the lack of toe levees at any time.

For your information we enclose copy of a letter addressed to the Area Engineer at Rosedale. Our dragline is now idle on the site and we would appreciate your early decision on these matters. Our hydraulic dredge will be ready for filling shortly after December First.

On the same day, to-wit, November 12, 1929, the plaintiff addressed the following letter to the Area Engineer, which is referred to in the letter to the contracting officer:

Referring to our conversation in your office yesterday at which time request was made that we be furnished with construction notes giving the toe distances and the yardage required on the landside enlargement on the above mentioned project. In view of your statement that toe distances could not be given us until we had started pumping, and you had had an opportunity to determine the class of material to be placed in the fill, and in view of the fact that you feel that at no time can you furnish us with more than 500 feet of construction notes, we feel obligated to refer these matters to the District Engineer for his decision. We regret that such action on our part is necessary.

As explained to you yesterday our bid on this work was based on information contained in Sheet Number 3 of the drawings supplied bidders accompanying specifications serial Number 29/370 and also on information

supplied us previous to the letting by the Area Engineer in charge at that time, Mr. W. L. Lipscomb. The drawing mentioned shows that landside enlargement Stations 1850–1998 and Stations 2065–2190 shall be by hydraulic method to the class C section and further indicates that this section was desired by showing typical sections at Stations 1900 and 1975 showing an 8 to 1 back slope. The Area Engineer at that time also informed us that the landside enlargement would be constructed to the C section back slope in verification of this. The back slope required had a great influence on our bid as under the alternate proposal we cannot be paid for material beyond the toe of the theoretical enlargement. Had we been given to understand at the time of the letting that it was contemplated to vary the slope on this landside enlargement we would probably not have submitted a bid on the project. We are of the opinion that in this case the general specifications Par. 19 do not apply and that the special specifications as indicated on the drawings made a part of the contract should govern. We now are ready to start constructing the toe levee for the landside fill commencing at Station 2190 and shall hold the United States responsible from this date for delay to the prosecution of this contract until construction notes are furnished us so that we may construct this levee which is a necessary preliminary before filling can commence. We cannot make this fill in 500 foot sections as this will not allow us to take care of our waste water. For your information we intend taking care of this water by using the drains which take off from the landside pits at various points, and we have obtained permission from the drainage boards to use their canals for this purpose. In order to properly care for this water it is necessary that we be allowed to construct sufficient toe levee to guide the flow of water to these drainage canals. Further from the yardage required from Station 2190 to 2182, which has been computed in your office, 500 feet of toe levee will allow us to operate our dredge only about 24 hours before we would be required to shut down to wait for the dragline to construct another 500 feet. We feel sure that you have not taken into consideration the type of plant to be used on this work in contemplating such a limit, as you are of course aware that a 24″ hydraulic dredge cannot operate under such conditions.

It is our desire to carry on this work in a manner thoroughly satisfactory to you and the District Engi-

neer, but we cannot obviously do so if conditions such as these are imposed.

We are today addressing the District Engineer asking for a decision on these matters, and are sending him a copy of this letter. Our dragline is now at Station 2190 waiting for the construction notes requested, and we beg to notify you that we are being delayed by causes beyond our control, and that we shall expect the time we are delayed to be added to our contract time.

On November 13, 1929, the contracting officer advised plaintiff that immediate steps were "being taken to condemn the necessary right of way."

7. The contractor found that, due to a rise in the Mississippi River about the middle of November 1929, he would soon be able to move his dredge into Lake Beulah, at the north end of the work, and so he decided to commence operations at Station 1850 southward, instead of at Station 2190 northward, as he had originally planned. He immediately began tracking his dragline from the lower to the upper end of the project.

8. It was necessary for the contractor to have more than 500 feet of construction notes, in order that he might be able to build a settling basin of practical dimensions. The contract was silent on the length of settling basins. Defendant's engineers claimed the right to restrict the contractor as to length, and the contractor claimed that under the contract the matter of length was within his own discretion. A conference was held between representatives of defendant and a representative of plaintiff November 19, 1929, at which it was determined by defendant's officers that on the upper landside enlargement the settling basins should not exceed 2,000 feet, and this determination was acquiesced in by the contractor. Prior to the arrival of the dredge the contracting officer would not permit the contractor to construct an indefinite length of full toe levee, for the reason that high water was impending, and the ditch at the landside toe of the old levee, created by excavation of material for the toe levee, would endanger the integrity of the old levee. Had the dredge been ready to operate it could have quickly refilled the ditch if the necessity had arisen.

The dragline, tracked from the lower end of the project, arrived at the upper end November 28, 1929, and was then

and there available for the construction of the toe levee. On that date the area engineer caused to be given to the contractor 4,000 feet of construction notes, southward from Station 1850, and the contractor was by him then authorized to construct a full toe levee, some 12 feet high, for a distance of 2,300 feet, 300 feet over the permitted 2,000 feet of a settling basin, and 1,700 feet of partial toe levee, 5 feet high, with full base, down to Station 1890, which the contractor did before he commenced pumping operations.

9. One of the pits requested in the contractor's letter of October 22, 1929, Finding 6, described therein as "the pit shown opposite the lower end of piece number seven," was afterwards known as Pit A. The material therein was predominantly buckshot and was considered very desirable material by the defendant. The Board of Mississippi Levee Commissioners acquired Pit A December 11, 1929, for use on the Beulah-Vermillion levee enlargement. Pit A was thereafter designated by the contracting officer for use on the upper landside enlargement and the material therein furnished the contractor by the United States by the time plaintiff was prepared to begin dredging operations.

10. On December 20, 1929, the contractor requested a change in the contract, permitting him to conduct operations on the lower landside enlargement by means of a clamshell dredger, taking material from the west side of Lake Vermillion and rehandling over the main levee, in lieu of an hydraulic dredger, the contractor representing that the material there was not satisfactory for hydraulic handling, that the separation that takes place in pumping would be avoided, that more than the contract 70% would thereby be left in place, that the clamshell dredger could be working during the same period as the hydraulic dredger thus advancing completion, and giving other reasons.

On January 13, 1930, the contracting officer consented to the change under certain conditions, which were not accepted by the contractor, and the change was not made.

11. About the middle of January 1930, before he commenced pumping operations, the contractor was given additional construction notes for the upper landside enlargement from Station 1890 to Station 1998, but was given

permission at that time to build only a partial toe levee, 5 feet high, from Station 1890 to Station 1998, the reason being that a full ditch incident to a full toe levee would have endangered the old levee. A five-foot toe levee was not high enough to retain the fill in a settling basin, and its sole purpose for the time being was to prevent overflow of the foundations below the settling basin that was then being filled up. The specifications required the foundations to "be thoroughly broken and turned to a depth of 6 inches." Overflow of the foundations by the effluent from the settling basin would deposit material and so wet and foul the foundations as to make the preparation thereof slow and difficult. The small toe levee, first erected, was to be left in place and merely added to to bring it up to full height of around 12 feet.

The effluent from the settling basins at the upper end of the work flowed first into old borrow pits (which extended the full length of the upper landside work, viz, from Stations 1850 to 1998), where it settled again and then drained into Clear Creek drainage district. The old borrow pits were turned into settling basins by the contractor, erecting a small dam at their outlet for that purpose, this being necessary to prevent clogging up the ditches in the drainage district with material not retained in the fill. The building of this dam caused water to back over the foundation below Station 1935, as will hereinafter be further described. The contractor built other dams or dikes outside the borrow pits to prevent overflow of farm land.

12. Plaintiff's dredge, the "Diesel," arrived at the site of the work January 12, 1930. It was placed in Pit A, connected up with the pipe system to the first settling basin, Stations 1850 to 1870, and started pumping January 28, 1930.

The end of the discharge pipe was first placed at Station 1850 or thereabouts, and was thereafter advanced and set back from time to time as conditions required.

The spillway was closed and the crossdike cut at Station 1870 February 23, 1930, with the end of the discharge pipe at or near Station 1857, 1,300 feet back from the crossdike at Station 1870, and 3,300 feet distant from the crossdike,

at Station 1890. The discharge pipe had previously progressed to about Station 1866, 400 feet distant from the then intact crossdike and spillway at Station 1870, and was on February 23, 1930, used in making a second lift, that is, depositing levee material over that already deposited to bring it up to the agreed section.

The second settling basin extended from Station 1870 to Station 1890, and the crossdike was breached and the spillway closed at Station 1890 March 15, 1930, with the end of the discharge pipe at or near Station 1866, 2,400 feet distant from Station 1890, and 3,900 feet distant from the spillway and crossdike at the end of the next settling basin at Station 1905. The end of the discharge pipe had previously been advanced to Station 1875, and brought back for a second lift.

On March 15, 1930, the effluent from the spillway began to overflow the foundations of the enlargement principally from Stations 1935 to 1976, due to failure of the contractor to build sufficient partial toe levee in advance to prevent the backing up over the foundations of effluent unable sooner to find an exit into the drainage system through the old borrow pits dammed up as described in Finding 11.

13. On March 9, 1930, at a time when the dredge "Diesel" was not pumping, the defendant's chief of operations in charge of the work, Major T. B. Larkin, defendant's area engineer, Edgar S. Maupin, and its inspector, William J. New, inspected the fill, and found below, that is, south of Station 1882, a small deposit of silt. Area Engineer Maupin attributed the deposit of silt to high placing of baffle boards in the spillway and a consequent ponding of water in the section, allowing silt to deposit instead of discharge through the spillway. On that date, March 9, 1930, he communicated with the contractor by letter as follows:

ORLEANS DREDGING CO.,
Leyser Bldg., Greenville, Miss.
In Person to Captain Cole,
Representative, Beulah-Vermillion Contract.

GENTLEMEN:

You are hereby directed to remove baffle boards from the spillways at the ends of your 2000′ settling basins on the Beulah-Vermillion contract.

The reason for this is to prevent the formation of silt pockets and give a free and unrestricted flow of runoff water from the several settling basins.

Very truly yours,

(Signed) EDGAR S. MAUPIN,
Edgar S. Maupin,
Senior Engineer.

cc to District Engineer, Vicksburg Engineer District, Vicksburg, Miss.

March 11, 1930, the plaintiff replied to this order as follows:

Replying to your letter dated March 9, 1930, addressed to this company and delivered to Captain Cole on the Beulah-Vermillion Contract, directing that the gates in our spillways be removed due to your feeling that the use of these gates will cause the formation of silt pockets.

We respectfully decline to remove these gates as you have directed, as the use of these gates is necessary in our opinion, both to retain material in the limits of the fill and as a means of preventing damage to private interests. These gates will not cause the formation of silt pockets in the final fill. Furthermore your order will interfere with the detailed method of operation on this contract and therefore exceeds the rights granted the United States by the contract and specifications.

Referring to the statement made by you yesterday that you would withhold any estimates due us until the directions referred to are carried out, it is our opinion that such action cannot properly be taken. We are not violating in any manner the contract, or the specifications. We are, as you know, placing material in the limits of the fill by the method prescribed in the contract from a borrow pit furnished us by the United States, in the event that by reason of the use of the method prescribed some of the material furnished us becomes objectionable to the Contracting Officer after being placed in the fill, we shall be glad to waste this material in accord with paragraph 24 of the general specifications, at the contract price per cubic yard if directed by him to do so. The runoff water from our operations now has a free and unrestricted flow, the gates in use merely serving to retain a part of the material that would otherwise escape through the spillway in such a short settling basin.

To this letter the contracting officer responded by wire March 12, 1930, as follows:

> Area engineer advises that you refuse to remove baffle board from spillway of your exit for discharge of waste water on your Beulah-lake Vermillion contract, thereby pocketing water between the center line of levee and outer limits of hydraulic fill stop as this is violation of specifications no payments will be made.

There ensued other correspondence between the contractor and the contracting officer, or his representative, with reference to operations on the upper landside enlargement. Therein the contractor maintained that removal of the baffle boards would cause excessive loss of material and the material so lost would injure the neighboring drainage systems, and that any unsatisfactory material would be gladly removed at the contracting officer's direction. The contracting officer, on the other hand, maintained that under the contract the contractor was required to deliver satisfactory material at the site of the enlargement; that the material then being there deposited was unsatisfactory; that the plan of operations was subject to the approval of the contracting officer; that the method of operation employed by the contractor deposited silt, which was unsatisfactory because it would not support other material and would slough. In a letter to the contractor March 31, 1930, he concluded:

> I am of the opinion that this material in question is unsatisfactory and will slough. Therefore, I cannot authorize any payment for this doubtful material.
>
> The material in the borrow pit is known to be satisfactory material. The only way in which such material can become unsatisfactory is due to the method of placing. Your method of placing, under paragraph 22 of the specifications is necessarily subject to the approval of the contracting officer. This authority is being invoked only when necessary to guarantee the fulfillment of the contract, namely, to provide essential material for levee protection and to safeguard the interests of the people and lands lying behind the levee.

14. The order to remove baffle boards from the spillways was not obeyed by the contractor. He endeavored to and

did, while operating from Pit A, retain in the fill all the material that he could, keeping the flow through the spillways as clear as he could.

The buckshot as it lay in Pit A was a union of fine sand, silt, and clay. In its natural state it was satisfactory levee material and was bound together by the clay. Sufficiently agitated in water, the buckshot would separate into its three elements, and once separated they could not again be so brought together in the fill as to bind and form satisfactory material for levee construction.

The material as it came out of the discharge pipe was comprised of water, fine sand, silt, clay, and solid buckshot. The solid, or undisintegrated buckshot, came out in lumps of various sizes, and settled close to the end of the discharge pipe. When dried, it formed satisfactory material; when wet it was slippery and showed a tendency to slide. The fine sand was carried on a little farther, then the silt was deposited and little or no clay in suspension was retained in the fill.

Homogeneity of material in the fill, that is to say, uniform distribution of the various elements (exclusive of water) coming from the discharge pipe, is best attained by uniformity of flow and maintenance of a constant distance from end of the discharge pipe to the outlet of the settling basin.

In pumping from Pit A the contractor's object was to retain in the fill all the material (aside from water) that he had pumped from the pit; the endeavor of the contracting officer and his representatives was to have expelled from the settling basin, before it had a chance to settle, all the silt and clay that had in the process of agitation become separated out of the buckshot. It was not possible in the process to reunite the binding element, clay, with the other parts of the buckshot and it was carried out as effluent material. There resulted a deposit of silt, substantially unmixed with other elements, in the fill from Station 1882 southward on the upper landside enlargement.

Silt did, in fact, in the upper landside enlargement, support buckshot superimposed upon it and by the method of operation used there were left in the upper landside en-

largement fill sections or areas of silt surrounded or covered up by other material.

A substantial aggregation of silt endangers the integrity of a levee and is unsuitable. When exposed to the action of water it is easily eroded.

The evidence is not satisfactory as to whether it was necessary to remove the baffleboards from the spillways and permit a free and unobstructed flow of runoff water from one or more of the settling basins in order to prevent the formation of silt pockets or deposit of the material classified by the contracting officer, as hereinafter related, as objectionable.

15. The third, fourth, and fifth settling basins on the upper landside enlargement were each 1,500 feet in length, a length less than the required 2,000 feet and chosen by the contractor for his own convenience.

The third settling basin extended from Station 1890 to Station 1905 and the spillway was closed and crossdike breached at Station 1905 April 1, 1930, when the end of the discharge pipe was at or near Station 1888, 1,700 feet back from the crossdike and spillway at Station 1905, and 3,200 feet from Station 1920.

The fourth settling basin was from Station 1905 to Station 1920 and the spillway was closed and crossdike cut at Station 1920 April 23, 1930, with the end of the discharge pipe at or near Station 1899, 2,100 feet from Station 1920 and 3,600 feet from Station 1935.

The fifth settling basin extended from Station 1920 to Station 1935, and the spillway and crossdike at Station 1935 were used intact up to April 26, 1930, at which time the end of the discharge pipe was at or near Station 1906+60, 1,340 feet distant from Station 1920, and 2,840 feet from Station 1935.

At that time, April 26, 1930, the dredge "Diesel" ceased pumping from Pit A, material there that was available having been for practical purposes exhausted.

In all, the contractor pumped from Pit A 621,131 cubic yards of material, 210,422 cubic yards of which were accepted by the Government in the fill, 138,722 cubic yards of which were rejected in the fill as unsuitable, and 38,832 cubic

yards of which were also rejected because superimposed upon the unsuitable material (as will hereinafter appear), representing a wastage through the spillways of 233,155 cubic yards, or 37.5%, in the process of dredging from Pit A.

If the contractor had so adjusted the baffle boards as to waste also the rejected 138,722 cubic yards through the spillways, the wastage therethrough would have been 371,877 cubic yards, or 59.9%.

If the contractor had used on the upper landside enlargement, Stations 1850-1998, one settling basin only, with one spillway, the wastage would have been about 93,170 cubic yards, or 15%.

16. Theretofore, on April 1, 1930, the contractor communicated with the contracting officer by letter as follows:

> We will exhaust the present borrow pit at Beulah Vermillion in the next few days. We enclose herewith a drawing showing the location of another pit which will be necessary so that we can complete the upper portion of the landslide enlargement adjoining Lake Beulah.
>
> The material in this pit is a good grade of sand overlaid with soft clay or buckshot.
>
> We request that this new pit be furnished as quickly as possible and will appreciate your immediate attention.

The borrow pit thus requested was on the northern bank of Lake Beulah and extended from opposite Station 1850 to opposite Station 1975. This request the contracting officer by letter of April 7, 1930 refused, on the ground that the pit contained a large percentage of unsatisfactory material, and suggested that there might be satisfactory material on the south bank of Lake Beulah at about Station 1900.

On April 10, 1930, the contracting officer by letter ordered the contractor to prepare properly the foundations that had been overflowed with the muck from the spillways by removing the deposit and breaking the ground as required by the specifications.

From the refusal of the contracting officer to furnish the borrow pit requested in the contractor's letter of April 1,

1930, the contractor on April 13, 1930, appealed to the president of the Mississippi River Commission, Brigadier General T. H. Jackson, who gave his decision to the contractor April 19, 1930, by wire as follows:

> Reference to telegraphic appeal and decision of Major Lee comma inspection by myself on eighth and by member of my staff since indicates it is undesirable to open borrow pits on west [north] bank of Lake Beulah for use in extension of present work until levee foundation is properly prepared in accordance with paragraph twenty of specifications stop this preparation is impossible at the present time on account of condition of the right of way created by your method of work stop in order to allow you time for preparation of this foundation in accordance with paragraph twenty and to prevent delay to your work district engineer has been directed to furnish the borrow pits for use along lower portion of your contract stop he has also been directed to prescribe under paragraph seventeen of specifications that on exhaustion of your present borrow pit that you commence work in vicinity of station one nine nine eight stop this action will prevent both delay and expense to you stop the question of detail location of borrow on west [north] bank of Lake Beulah will be taken up later stop in connection with this general subject my inspection on eighth showed deliberate violation of specifications by your local engineer in the ponding of water stop it is suggested that you give this matter careful consideration as continuation of this policy is certain to lead to delay in completion of the work which is undesirable both to your company and the Government.

On April 21, 1930, by direction of the contracting officer, the contractor was orally assigned to the use of Borrow Pits C and D, located as hereinafter described.

On April 22, 1930, the contracting officer ordered the contractor to work north or south from the vicinity of Station 1998. Work north thereof was on the upper landside enlargement; south thereof on the riverside enlargement.

On April 25, 1930, the contractor, after describing his plan of operations in the vicinity of Station 1998, which disclosed his purpose to dredge to the riverside fill south of Station 1998 simultaneously with preparation of founda-

tions and erection of toe levee on the uncompleted upper landside enlargement north thereof, requested of the contracting officer a pit on the northern bank of Lake Beulah opposite Stations 1850 to about 1925 for use on the uncompleted portion of the upper landside enlargement. The request for this pit was not granted.

17. The contractor moved the dredge "Diesel" into Pit D April 30, 1930, by cutting a channel. Pit D was located alongside the riverside enlargement, riverward, from Station 2000 to about Station 2065, and contained material similar to that in Pit A. The contractor could not fill northward from Station 1998 at that time, April 30, 1930, due to the fact that the foundations north of Station 1976 had been fouled and not yet prepared, and there were no toe levees yet constructed for some distance north of Station 1998.

Toe levees were not used by the contractor for the first lift on the riverside enlargement, because of the physical conditions.

Old borrow pits ran alongside the site of the riverside fill, and the contractor pumped against the face of the old levee, allowing the material to run into the borrow pits until it created a "false berm" between borrow pit and levee and gave sufficient base for a toe levee which he built later on for his second lift. The first lift, a blanket fill, was made from Pit D, and operations therefrom began May 1, 1930, and ceased June 12, 1930. The dredge "Diesel" was shut down June 12, 1930, and did not resume operations until it was removed to Pit C and operated therefrom beginning October 6, 1930. The period of this delay, June 12, 1930, to October 6, 1930, is chargeable to the neglect of the contractor to proceed with the work. The contractor did no corrective work on the upper landside enlargement from about the first of **May to the middle of June 1930.**

~~From Pit D the contractor pumped 493,256 cubic yards of material for the riverside enlargement, Stations 1998–2065. Of this quantity the Government accepted 137,014 cubic yards in the fill and 5,151 cubic yards outside the prescribed limits of the fill as "false berm." The remainder, 351,091 cubic yards, remained in the old borrow pits and was not paid for by the Government. This method of dredging from~~

~~Pit D to the riverside enlargement, with consequent overflow of 351,091 cubic yards into the old borrow pits, was reasonable procedure, and was not objected to by the Government. No spillways were used on this lift. The Government paid for the 5,151 cubic yards of "false berm," on the ground that the levee was benefited thereby and that it was proper that the contractor should be paid therefor. False berm is an additional shoulder of material placed artificially alongside the levee in order to give it additional stability and foundation.~~

Article 1 of the contract provides that the contract shall be performed "in strict accordance with the specifications, schedules, and drawings, all of which are made a part hereof" and in Article 2 that "anything * * * shown on the drawings and not mentioned in the specifications shall be of like effect as if shown or mentioned in both." Article 1 also referred to sketches for riverside and landside enlargement attached to the contract. The contract drawing in a "legend" to the left opposite a green line insignia on the drawing for "riverside" work has this note:

> Riverside enlargement to be preceded by hydraulic fill of present pits.

In this manner the contract located the riverside work and provided what should be done with the pits which the evidence shows were close to the toe of the addition to the levee.

18. On May 21, 1930, while the contractor was pumping buckshot from Pit D on the riverside enlargement, he requested of the area engineer that he obtain for use on the levee enlargement a buckshot pit of comparatively small extent about opposite Station 2000, in addition to larger pits adjoining, already condemned for use on the work.

19. The contractor removed the effluent from the levee foundations, accumulated there as hereinabove described, below Station 1935, commencing the removal June 12, 1930, and completing the same June 30, 1930, using dragline, scraper, and other dry-land equipment. The cost of removal was approximately $3,685.17. The amount removed was 44,444 cubic yards.

20. On June 14, 1930, a conference was held between representatives of both sides at the office of the Chief of Engineers, U. S. Army, in Washington, D. C., Maj. Gen. Lytle Brown, for the purpose of adjusting disputes that had arisen between them. At this conference, the Chief of Engineers ruled that material placed by the contractor from Stations 1882 to 1935 from Pit A, and theretofore objected to by the contracting officer as material not suitable for levee construction, due to the method of transporting from Pit A and placing in the settling basins, would have to be removed by the contractor and at the contractor's expense. The preparation of foundations theretofore also objected to, was conceded by the Government representatives as acceptable.

21. On June 24, 1930, the contractor made a written request of the contracting officer for an indeterminate extension of time for performance, due to delay then being experienced on account of certain actions of the Government complained of, in the nature of interference with the contractor's mode of operation, chiefly, the limitation of settling basins and resultant deposit of muck over fundations, and enforced removal to Pit D before the upper landside fill had been completed.

The contracting officer refused the request and on June 30, 1930, so notified the contractor. From this refusal the contractor on July 30, 1930, appealed to the president of the Mississippi River Commission, who on August 16, 1930, refused to entertain the appeal on the ground that he had no authority to do so.

22. On June 24, 1930, the contractor requested of the contracting officer that he designate the exact locality of the unsuitable material from Stations 1882 to 1935 which General Brown in the conference of June 14, 1930, had ruled must come out at the contractor's expense, give directions for its disposal, and furnish information as to location of pits for the remaining work on the upper landside enlargement extending from Station 1876 to Station 1998.

July 5, 1930, the contracting officer notified the contractor that a satisfactory disposition of the unsuitable material

would be on the landside in the old borrow pits not closer than five feet to the landside toe of the new enlargement, and gave the detailed extent and location of the unsuitable material between Stations 1882 and 1935, amounting approximately to 138,000 cubic yards.

July 7, 1930, the contracting officer in writing furnished the contractor with the location of borrow pits satisfactory to him for the contract work. The locations shown were severally designated borrow pits "A," "B," "C," "D," and "E." The locations of borrow pits A and D were as hereinabove indicated and had already been used. Borrow pit B was on the south bank of Lake Beulah opposite Stations 1883 to 1906, and was never used; borrow pit C was on the south bank of Lake Beulah near Station 1991; and borrow pit E ran along the western bank of Lake Vermillion opposite the lower landside enlargement site, Stations 2065 to 2190.

Pit B was substantially the pit referred to by the contracting officer in his letter to the contractor dated April 7, 1930, as possibly containing satisfactory material. Pits A, B, C, D, and E were all buckshot pits.

On July 24, 1930, the contractor stated his objections to Borrow Pits A, B, C, and D, and made no mention of Borrow Pit E.

The principal objections by the contractor were the great waste from buckshot pits required by the contracting officer's definition of unsatisfactory material, the difficulties of flotation of the dredge "Diesel," and there was an additional objection made to the use of Pit A on account of its substantial exhaustion.

On August 1, 1930, the contracting officer by letter to the contractor denied the validity of all these objections.

23. The contractor not having removed the unsuitable material directed by the Chief of Engineers to be removed on the upper landside enlargement between Stations 1882 and 1935, the contracting officer, on September 25, 1930, by letter to the contractor again ordered its removal.

The contractor, October 3, 1930, replied to this order as follows:

Replying to your letter of September 25, 1930, relative to removal of material between Stations 1882 and 1935; also regarding our resumption of work.

It is our purpose to begin pumping in material near Station 1998 within the next five (5) days; that is, as soon as pipeline can be laid. This material to be taken from borrow pit "C" as designated by you. This work will be prosecuted toward Station 2065, with spillways 2,000′ apart.

While the above-mentioned work is being done (between Stations 1998 and 2065) we will be installing the pipeline from the new pit recently selected on the Island (approximately opposite the work between Stations 1882 and 1935), from which latter pit we propose to pump in the landside enlargement between Stations 1882 and 1935. We understand that the material in this latter pit consists of coarse sand and will require only one spillway.

It is also suggested, subject to your approval, that the removal of the 138,000 cubic yards of objectionable material (between Stations 1882 and 1935) be accomplished by washing same out with the discharge from the pump. This removal is to be done by using the booster plant for this purpose. The spillway for wasting this material to be located through the controlling levee so that this unsuitable material can be wasted into Lake Beulah.

It is understood that in using this latter borrow pit it will be necessary to strip the overburden of unsuitable material to a depth of approximately nine (9) feet; that is, until suitable sand is reached and flotation for the dredge is obtained. This latter material (stripping) to be wasted into Lake Beulah.

Hoping the above meets with your approval, we are, etc.

The pit referred to in this reply as approximately opposite work between Stations 1882 and 1935 was a sand pit, on the northern bank of Lake Beulah, and was known as Pit 2-A.

24. From Pit D the contractor moved his dredge "Diesel" to Pit C, and started pumping therefrom about October 6, 1930, into the riverside fill, over the blanket laid down by the dredging operations from Pit D. For the second operation a toe levee was used, erected atop the blanket fill, from

Stations 2000 to 2020. The riverside fill was completed from Pit C.

~~From Pit C the contractor dredged 1,170,895 cubic yards for the riverside enlargement, of which the Government accepted 237,774 cubic yards in the fill, and 111,562 cubic yards as "false berm." The remainder came to rest in the old borrow pits, outside the limits of the levee enlargement and "false berm," amounting to 821,469 cubic yards, and was not paid for. As stated in Finding 17, this was a reasonable procedure to which the defendant made no objection.~~

The aggregate of 1,172,560 cubic yards of material pumped from Pits C and D was not accepted by the Government either as fill or as false berm, and 669,647 cubic yards thereof went into old riverside borrow pits that were used in the construction, restoration, or enlargement of the old cut-off levee between Stations 1998 and 2067 before the commencement of any work by the plaintiff herein. The remainder, 502,913 cubic yards went into more distant borrow pits or other depressions whose connection with the cut-off levee or reasonable proximity thereto is not established, or was otherwise dissipated, and its allocation to these several destinations does not appear. The plaintiff has not been paid for the material which went into the old riverside borrow pits as above stated.

25. The material from Stations 1882 to 1935, objected to by defendant's officers, was so doubtful in nature as to justify its classification as unsuitable for levee construction. The contractor had pumped thereover a quantity of suitable material, and in the process of removal the suitable material necessarily had to be removed also, some small portion of it being thereafter replaced. This material, both suitable and unsuitable, was not washed out as suggested in the contractor's letter of October 3, 1930, but was removed by the contractor by the so-called dryland method, in this instance by the use in the main of draglines, the work being accomplished from September 1930 to May 1931.

The unsuitable material consisted of 138,722 cubic yards and the overlying suitable material, 38,832 cubic yards. For placement and removal of this total of 177,554 cubic yards

the contractor was paid nothing. The approximate cost to him of removal was $48,332.73.

26. Pit 2–A was a sand pit, overlaid with material which was not suitable for levee construction and which had to be wasted. The contracting officer January 31, 1931, communicated with the contractor regarding this borrow pit as follows:

> There is enclosed herewith a blueprint showing pits which are designated on the west [north] bank of Lake Beulah, for use in the construction of the levee between stations 1876 and 2000 on your Beulah-Lake Vermillion contract. Material to be removed and wasted before any material from pits is used in the levee is also shown by sections on the blueprint.
>
> The wasting of this overburden involves the handling of approximately 459,000 cubic yards of material which will be paid for at contract price per cubic yard.

The contractor moved his dredge to Pit 2–A about February 7, 1931. The overburden thereof was accordingly stripped and wasted by the contractor and the remainder of the work on the upper landside enlargement completed hydraulically with sand from Pit 2–A, including the replacement of 138,722 cubic yards removed as described in Finding 23, and the greater part of the 38,832 cubic yards of satisfactory material superimposed.

From Pit 2–A the contractor stripped and wasted an overburden of 499,836 cubic yards, for which the Government paid, and dredged into the fill 821,229 cubic yards thereunder, for which the Government also paid the contractor.

27. On May 15, 1931, the contractor communicated with the contracting officer by letter as follows:

> We expect to finish pumping from the present borrow pit (No. 2—about opposite Station 1900), about May 25th, 1931.
>
> In order to complete the landside enlargement from Station 2065 to Station 2190, it will be necessary to locate and use another pit.
>
> I am advised that explorations and borings show a pit with suitable material, located along the west [north] shore of Lake Beulah, about 5,000 feet southwards of the present pit (No. 2), that is, about opposite

Station 2000, and about 1,500 feet westward of the east shore line of Lake Beulah.

I am also advised that some stripping of unsuitable material will be required.

You will recall that we attempted recently, with the Dredge *Houston*, to use the pit on the west side of the Mississippi River to make this landside enlargement, but after pumping some fifty to sixty thousand yards, we were compelled to discontinue this operation on account of the drift and current breaking up our pipe line.

On account of the short time remaining to make the above described change, we would appreciate your prompt reply and instructions regarding above matters.

We have permission from the owners to use the above-described pit.

The pit described in this communication as about opposite Station 2000 came to be designated Pit 4–C. It was a sand pit and, except for 58,602 cubic yards taken from the Mississippi River by another dredge, an operation found to be impracticable, furnished all the fill on the lower landside enlargement.

The contracting officer's representative on May 20, 1931, replied:

The pits originally designated for this work were on the west bank of Lake Vermillion and are still available. However, should the desired new pit on the west [north] bank of Lake Beulah contain suitable material, it will be approved by this office, provided that all objectionable material be stripped from same without cost to the United States.

On receipt of your agreement to the above the necessary borrow pits will be investigated and designated.

To this the contractor responded May 23, 1931, that:

(1) The only pits which we are aware of that contain material which conforms to the contract and specifications, that is, "75% or more sand," for the landside Enlargement (Station 2065 to Station 2190), are the pits on the west [north] side of Lake Beulah, as previously suggested in our letter of May 15th.

(2) Our past experience in "placing hydraulically" the material found in pits "A," "C," and "D," which material in the pits is similar to the material found along the west bank of Lake Vermillion, indicates to

us that if we attempted to "place hydraulically" this Lake Vermillion material, that your office will reject 65% to 70% of same after being so placed.

(3) If you know of any pits on the west side of Lake Vermillion which contain material in conformity with the contract and specifications, that is "75% or more sand," we would appreciate your designating their location.

(4) For your information, we completed on May 22nd, the construction of the landside enlargement from station 1990 northward, and we are ready to proceed with the construction of the landside enlargement between station 2065 and station 2190.

(5) In view of all of the above, we would respectfully request your further advice and instructions on the subject matter.

On May 29 1931, the contracting officer replied to this, stating that: "Your letter is in error in stating that the contract and specifications require that the material for the enlargement in question contain 75% or more sand."

The contractor wired the contracting officer June 1, 1931, that he did not concur in this decision but that if satisfactory he would proceed with the stripping without prejudice to his rights.

On June 2, 1931, the contracting officer wired the contractor as follows:

> Retel June first borrow pits you propose on west [north] bank Lake Beulah for lower landside enlargement stations twenty sixty five to twenty one ninety not satisfactory stop borrow pits on west bank Lake Vermillion originally designated for this section are available.

From this latter decision the contractor appealed to the Chief of Engineers June 8, 1931. The Chief of Engineers denied the appeal June 11, 1931, and ruled as follows:

> Your contention that a levee of Class C Section must contain 75 percent or more of sand is incorrect. A true statement is that if the material does contain 75 percent or more of sand the levee should be of Class C section. The prescribing of Class C Section does not carry with it the requirement of 75 percent or more of sand but guards against 75 percent or more of sand being used in the smaller sections.

> You must use the pits designated by the contracting officer or you must protect the United States against unsuitable material at your own expense in case pits are selected by you.

On June 12, 1931, the contractor agreed with the contracting officer to strip Borrow Pit 4–C at his own expense. The contractor thereafter stripped Borrow Pit 4–C of 627,684 cubic yards of unsuitable material and deposited the material thereby exposed, consisting of sand, in the fill of the lower landside enlargement, by the hydraulic process.

For the 626,684 cubic yards of material so stripped the contractor has not been paid. From strata thereunder the contractor pumped to the lower landside enlargement 412,942 cubic yards, which was accepted and paid for as fill, 15,572 cubic yards which was accepted and paid for as "false berm" or extra material, and 32,186 cubic yards, which was wasted and not paid for, a total of 460,700 cubic yards.

28. Had the Government placed no restriction on the length of settling basins, the contractor would have had to use at least three, one for the upper landside enlargement, one for the riverside, and one for the lower landside. The Government placed no restriction on the length of settling basin in the lower landside enlargement.

The settling basins required by the Government, in excess of these three, were seven in number, necessitating five extra crossdikes and seven extra spillways.

The approximate cost of erection, maintenance, and demolition of the seven spillways was $3,636.20. The approximate cost of erection of the five crossdikes was $466.50, consisting of 4,665 cubic yards of material.

29. The entire contract work was completed by the plaintiff December 8, 1931, representing a delay in completion of 255 days, for which the defendant withheld from the contract price $2,550. The delay of 255 days was due to the failure of the plaintiff to prosecute the work with due diligence and is not attributable to any act or acts of the defendant. The propriety of the deduction of liquidated damages was not passed upon by the contracting officer, but was by him left to defendant's accounting officer.

30. The claims made in paragraphs XV, XVI, and XVII of the petition, with respect to increased length of pipe line, are abandoned by the plaintiff.

OPINION

GREEN, *Judge*, delivered the opinion of the court, March 17, 1938, as follows:*

The plaintiff entered into a contract with the defendant for dredging, transporting, and placing material to be used in the construction of an addition to a levee along the Mississippi River. The price of the work per cubic yard placed was fixed at 35.47 cents and the contract estimate of its amount was approximately $851,280. Excluding the claims which have now been abandoned under the allegations of the petition, the plaintiff seeks to recover approximately $1,022,958.64 for additional work and expense alleged to have been wrongfully caused or required by the defendant in the course of the operations under the contract together with $2,550 deducted as liquidated damages for delay. Included in the recovery asked is an alternative claim for work alleged to have been performed under the contract and not paid for.

As the parties do not agree upon the construction of the contract or upon the facts shown by the evidence, it becomes necessary to first construe the contract and then determine what has been proved or disproved by the testimony.

The plaintiff claims that the contract was one for dredging work; the defendants insists it was for levee work. The contract provided in substance that the material should be moved by a hydraulic dredge but it was well understood that the fill which was to be made with the materials moved was to constitute the base of the addition to a levee, except where the material was used to fill old borrow pits pursuant to the contract. We think that neither party is entirely right with reference to the construction of the contract.

The contract is not as clear as it might have been made and we find it necessary to construe its provisions in the light of all of the circumstances in the case.

*(Note.—See 86 C. Cls. 404.)

The specifications attached to the contract provided that—

> Alternate bids will be received for placing * * * the required yardage hydraulically in any approved manner.

The contracting officer and counsel for defendant construe the words "in any approved manner" to mean in a manner approved by the contracting officer, but we think it clear that so far as these words taken alone are concerned they cannot be so construed. It is not so stated in the words quoted and they would not be so understood as applied to engineering work. The words "approved manner," when used without other limiting expressions with reference to the performance of the work, we think mean "sanctioned" or "endorsed" generally by those skilled in the business or occupation which is exercised in the performance of the work. This approval need not be unanimous as there is often a difference of opinion in such matters even among those most skilled. In such cases, however, if the practice used is sanctioned by a decided majority or by those shown to be best informed and skilled in the work it becomes established as the "approved method."

Counsel for defendant in further support of the argument that the approval of the Government engineer was required quotes the following from specification 22 of the contract, which provides—

> In the event that the contractor proposes to do the work by hydraulic methods, his plan of operation shall be submitted to the contracting officer for approval.

We think that this provision of the contract was abandoned or waived. A plan of operations could not be furnished by the contractor until he received the necessary construction notes and was assigned a borrow pit or pits from which he was to dredge for the fill. No attention seems to have been paid by either party to this provision. No plan was furnished by plaintiff nor was any requested by defendant. The reason appears to be that the work was begun long before complete construction notes necessary for preparing a plan were furnished by defendant and some of the work was begun before any construction notes were

available. In fact, defendant advised plaintiff that toe distances could not be given until plaintiff had started pumping and defendant had an opportunity to determine the class of material to be placed in the fill, and further that defendant could not furnish more than 500 feet of construction notes [at one time] which was too short for practical purposes and insufficient for the preparation of a plan of operations. The contracting officer, however, claimed the absolute right to pass finally upon the *method* used by plaintiff in placing the material and considered that when he determined it was "not proper" this ended the matter. In this respect he erred, but this holding will be found not material to the decision of the case as we proceed with its further consideration.

There is another provision of the contract which defendant claims was violated by plaintiff and was one of the reasons given by defendant for requiring plaintiff to remove a large quantity of material which plaintiff claims had been properly placed in accordance with the contract. Section 22 of the specifications of the contract provides—

> No earth showing a tendency to slough shall be placed in the embankment.

The meaning of the word "slough" as given in the dictionary [except where used as a medical term] is to shed or cast off. As thus used it refers to a separation of material. We are unable to apply the clause of the contract quoted above to the conditions under which hydraulic work must necessarily be carried on. The material had to be pumped and it could only be pumped when in a semi-fluid condition, and when discharged it would not only separate but actually flow. Its condition when discharged at the end of the suction pipe was such that this provision could have no application thereto. If this clause has any application, it must refer to the material which had settled and been deposited, but here another difficulty is encountered. What kind of an appearance would be presented by material "showing a *tendency* to slough" is not disclosed by the testimony. Our determination of other provisions of the contract considered later on is, however, such that a construction of this provision is of no importance.

The contract was not only for moving material but for placing it by hydraulic methods. Moreover, it was stated therein that the earth to be moved was to be used as an embankment for the construction of an addition to a levee. Placing the material in an approved hydraulic manner did not end with its discharge from the suction pipe. It is true that a hydraulic dredge draws into its pipe the material just as it comes. The material to a certain extent is disintegrated and segregated into its component parts by reason of the action of the cutters in the borrow pits and the agitation caused by pumping. (See Finding 14.) This agitation cannot be controlled but the evidence shows that as the material is discharged it is possible to substantially control the placing of it so that the suitable material will be deposited in the fill and the unsuitable material for the most part flow off. Such being the case, we think the contract required that when the material was distributed after it emerged from the discharge pipe it should be so placed by means of settling basins and control of the flowage that any considerable quantity of unsuitable material would not be deposited in one place when intended to be used as part of the base of an enlargement of the levee.

Defendant's counsel call attention to specification 39.1 wherein it is provided:

> * * * in no case shall pockets of water be permitted to remain between the center line of the levee and the outer limits of the hydraulic fill.

This provision had no reference to so-called "ponding" in the settling basins but applied to the finished work after the fill had been made complete.

We have set out our construction of the disputed provisions of the contract in order that they might be applied to the facts established by the evidence. When the plaintiff's case is analyzed, however, it will be seen that the application of the rulings made above is considerably restricted. The reason for this is that there is no substantial controversy as to the nature of the material which plaintiff placed in the fills forming part of the levee. A portion of it, which defendant required plaintiff to remove

as unsatisfactory, is shown to have been unfit for levee purposes by the evidence as a whole. (See Finding 25.) The remainder complied with the contract and was accepted and paid for. The controversy for the most part arises as to whether the restrictions placed by defendant on the flow of material as it came from the discharge pipe caused unnecessary wastage and were arbitrary. In other words, the controversy so far is not whether plaintiff deposited unsuitable material in the fills, but whether defendant, by its requirements and restrictions, caused large quantities of material to be unnecessarily and unreasonably wasted so that plaintiff is entitled to recover therefor as if this material so wasted had been placed in the fills.

The evidence with reference to the alleged wastage of material is extremely indefinite and conflicting. It establishes nothing except, as we have before stated, that the deposit of material in the fills may be largely controlled by the use of settling basins, spillways, baffleboards, etc. The material which came from the discharge pipe was mixed with water in such a condition that it would flow to a greater or less extent and separate from the water as it flowed. It is a matter of common knowledge that the heavier material in this mixture will first be precipitated; then the next in weight; and last what has been referred to in the testimony as "fines," that is, fine material consisting mostly of silt. The parties agree that silt in considerable quantities by itself is not suitable for levee purposes and it is evident that there would be more or less wastage if methods were used to prevent an undue accumulation of unsuitable material. The parties dispute as to the number of settling basins which should be used and not only as to the number of baffleboards and spillways but as to the effect thereof. The plaintiff wished to have them so arranged that as much material as possible would be deposited. The result would have been that nearly all the material which was pumped would go into the fills and this would have placed in the fill considerable quantities of unsuitable material. The defendant, through its contracting officer, insisted in some instances on restricting the length of the settling basins to 2,000 feet and also required that the baffleboards should not

be used in such a manner as to prevent the continuous flow of water. In some instances, this method resulted in over half of the material pumped being wasted. This would seem to be unnecessary, but how much would be wasted when proper methods were used to prevent unsuitable material being deposited, we cannot determine. Finding 15 shows that when pumping from a certain pit if one long settling basin were used, as plaintiff desired, only 15% would be wasted, but plaintiff's method, as we have stated above, would have resulted in considerable quantities of unsuitable material being deposited in the fill. We are unable to determine just how much would have been wasted if a proper method, or an "approved" method had been used, for the reason that the evidence fails to disclose any approved method of controlling the placing of the material by settling basins, baffleboards, etc. There is nothing to show any rule or established practice in this matter and it is difficult to see how there could be for the method would be different with the different kinds of material pumped. Plaintiff itself used settling basins shorter than 2,000 feet when pumping material composed largely of sand.

The lack of evidence on this point, however, does not relieve the plaintiff of responsibility if defective material was in fact placed in the levee fills for reasons above stated and others that will be hereinafter given.

Taking up next, in their order, the several claims made by plaintiff in its petition, we find that the first claim [paragraph VI of the petition] is for 138,722 cubic yards of material moved on orders received from the contracting officer from the landside toe of the new levee prism to the old borrow pits. Claim 2 [paragraph VII of the petition] goes with No. 1, as it has the same facts as a basis and is for 30,000 cubic yards of material furnished by plaintiff from borrow pit A designated by defendant and which, under defendant's orders, was removed from the landside toe of the new levee prism to old borrow pits. This material was suitable but had been deposited above the material described in claim 1 and consequently had to be removed if the material referred to in No. 1 was taken out.

In this connection the plaintiff claims that the contract contains a direct provision that it should be paid for the removal of waste material. The provision upon which it relies is set out in paragraph 24 of the specifications and is as follows:

> *Disposition of objectionable material.*—When the borrow pits, or the ground to be occupied by the levee, contain soil which is unfit to be put into or remain under the levee, the contractor will be required to remove the same and dispose of it as directed by the contracting officer. If such material removed from the ground is wasted, the contractor will be paid for it at the contract price per cubic yard.

We think it obvious that this provision pertains only to material in the borrow pits and the ground to be occupied by the levee. In many cases the suitable material in the borrow pits was overlaid with material unfit to be put in the levee. In this event, of course, it was necessary for it to be removed before pumping the suitable material out of the borow pits. For the removal of material so wasted the plaintiff was to be paid but this provision has no application to unsuitable or defective matter which was placed in the fill forming part of the levee.

Defendant's engineers advised plaintiff that this material was unsatisfactory and ordered its removal. "Unsatisfactory" is not necessarily the same as unsuitable. We do not need, however, to decide whether their action determined the matter, for the evidence pertaining to this particular deposit shows it to be of defective material. (See Finding 25.) Indeed, this is scarcely disputed on the part of the plaintiff. The evidence makes it plain that it was easily distinguishable from the suitable material which plaintiff had placed above. Plaintiff seems to contend that the contract only required that it should pump the material from designated borrow pits and if, when it was discharged, defective material was placed in the fill, it was not responsible. This, we have shown above, is an error, for its responsibility did not end when the material came out of the

discharge pipe. Moreover, this is definitely settled by another provision of the contract. Article VI provides:

> The Government shall have the right to reject defective material and workmanship or require its correction. Rejected workmanship shall be satisfactorily corrected and rejected material shall be satisfactorily replaced with proper material without charge therefor, and the contractor shall promptly segregate and remove the same from the premises.

The Government had the right under this provision to have the situation corrected and the necessary work done for such purpose and was not required to pay for the placing of this material in the fill, nor on account of its removal, unless some liability was incurred by reason of the material being used to fill the old borrow pits, a matter which will be considered later; or, unless the deposit of defective material came into existence because of unreasonable and unnecessary requirements made by defendant.

Having found that the material was in fact defective, claims 1 and 2 must be rejected for the reasons above stated, regardless of whether the method prescribed by defendant would have prevented the deposit of defective material or whether this method would have unnecessarily restricted the deposit of proper material, and we do not pass on these questions.

Claim 3 [paragraph VIII of the petition] is based on an alleged unnecessary wastage of material pumped from pit A by reason of defendant's restrictions on the length of the settling basins to 2,000 feet, and on the use of baffleboards.

Pit A was a buckshot pit in which there was a union of fine sand, silt, and clay. In its natural state it was satisfactory levee material bound together by the clay, but when mixed with water and drawn through the suction pipe it was disintegrated and a large amount of unsuitable material which, as it lay in the pit had been bound in with more solid matter, became separated and unfit for use in the construction of the levee. If the material deposited was restricted to that which was suitable, a large amount of wastage occurred (see Finding 14). This is practically conceded by plaintiff but it insists that the defendant's require-

ments as to settling basins, baffleboards, etc., caused an excess wastage of 139,985 cubic yards which was entirely unnecessary. It may be, as we are inclined to think, that the restrictions and requirements made by defendant were excessive but the evidence does not show the amount of wastage which would have occurred if proper methods had been used—that is, methods which would have prevented the deposit of any considerable quantity of unsuitable material. Finding 14 shows the difficulty which arose when buckshot was pumped and while the evidence in some respects is indefinite it does show, as we think, that a large amount of waste was unavoidable in properly placing this material. On this point the evidence is conflicting, in some respects on both sides we think unreasonable, and from it we are unable to make even an approximation as to the proper amount. This claim must therefore be rejected.

Claim 4 [paragraph IX of the petition] is based in part on the failure to designate additional borrow pits and defendant's order to begin placing the materials without retaining levees. We think this claim and claim 5 [paragraph X of the petition] are not proved except as they are merged in claim 6 which will next be considered.

Claim 6 [paragraph X½ of the petition] is for filling old borrow pits on the riverside of the levee and is advanced as an alternative to claims 4 and 5, as the wastage claimed in 4 and 5 flowed into the old riverside borrow pits. This claim depends on the construction of the contract, or to state it more definitely, on the construction of a requirement placed in a sketch attached to the contract which will next be considered. The contract included specifications for levee work which were amplified by drawings and sketches attached thereto and made a part thereof, and the work was required to be *strictly* in accordance with the specifications and drawings. The contract drawing had a heavy green line as an insignia for the "riverside" work and also a note as follows: "Riverside enlargement to be preceded by hydraulic fill of present pits." A large portion of the material pumped from pits C and D was wasted. Plaintiff claims that this waste occurred by reason of the restrictions

on the settling basins and removal of the baffleboards under the unreasonable and improper requirements made by the defendant. But there would have been a large amount of waste in any event if only proper materials were permitted to be deposited in the fill. How much this waste would be, we do not find it necessary to determine because the wastage overflowed into the old borrow pits on the riverside of the levee and plaintiff under the contract would be entitled to recover to the extent that these borrow pits were filled thereby. It is argued on behalf of defendant that the provision of the contract last above quoted was intended to apply only in case a dry fill was made and hydraulic methods not used. But there is nothing in the evidence which would support this construction. On the contrary it would seem that there may have been no occasion for this provision if the dry fill method had been used, or at least no more occasion for it. It would seem reasonable that the defendant would not want borrow pits of a size capable of holding such a large amount of material to remain empty on the riverside and adjacent or near the toe of the enlargement of the levee and that the stability of the levee would be increased when these pits were filled with earth. The borrow pits, if empty, would be filled with water when the river was at a high stage. But we do not base our conclusion on what has just been stated and it is not necessary that we should do so for the contract is quite plain in this respect—indeed much plainer than it is with reference to most of the matters in controversy. We think the plaintiff was required to fill the borrow pits on the riverside and if we are correct in this it was entitled to pay for the material that went into them.

It is also contended on behalf of defendant that the yardage for which it was to pay is limited by the estimates contained in the specifications plus 20%, but in Article 1 of the contract the words "more or less" follow directly after the figures stating the yardage to be moved and placed. Moreover, we think that taking the contract as a whole it was intended that the plaintiff should be paid for all work done under it. It is also said that a letter from

plaintiff showed it understood that it was not to be paid for material extending beyond the toe of the levee. But in the letter plaintiff was writing about the *landside* enlargement, and we do not think defendant would be willing to have the remainder of the contract construed according to plaintiff's understanding of it. Elsewhere the defendant is insisting that the contract be constructed strictly against plaintiff.

Another provision of the contract cited on behalf of defendant plainly applies only to cost of clearing, sodding, etc., and has no application here.

This makes it necessary to determine how much material was thus disposed of. From pit C the plaintiff dredged 1,170,805 cubic yards but the Government accepted only 237,774 cubic yards in the fill and 111,562 yards as "false berm." The remainder, amounting to 821,469 cubic yards, overflowed into the old borrow pits outside of the levee enlargement and false berm. Here no claim can be made that the material was defective for the purposes for which it was used.

From pit D the contractor pumped 493,256 cubic yards of material for the riverside enlargement. Of this quantity the Government accepted 137,014 cubic yards in the fill and 5,151 cubic yards outside the prescribed limits of the fill as "false berm." The remainder, 351,091 cubic yards, went into the old borrow pits and was not paid for by the Government. No spillways were used on this lift and the work proceeded in this manner by common consent. A "false berm" is an additional shoulder of material placed alongside a levee to give it additional stability and foundation and the Government paid for what went into the false berms on the ground that the levee was benefited thereby. The total amount placed in the old borrow pits on the riverside of the levee and not paid for was 1,172,560 cubic yards, which at the contract price amounts to *$415,907.03, which plaintiff is entitled to recover.

Claim 7 [paragraph XI of the petition] is for 44,444 cubic yards of effluent materials which went through the spillway and were deposited on the foundations of the en-

*(See order, *ante*, p. 171.)

largement below station 1935. Plaintiff concedes that it was necessary to remove the deposit as not being suitable for foundation purposes but claims that it was caused by the defendant's interference with the length of basins, height of spillways, and erection of dikes. Here again the evidence is conflicting. No definite conclusion can be derived from it except that the claim is not supported by a preponderance of the evidence.

Claims 8 and 9 [paragraphs XII and XIII of the petition] are in the same situation. We are unable to determine from the evidence just how many settling basins would be required for doing the work in approved hydraulic manner and consequently unable to determine whether the defendant's engineer acted arbitrarily in requiring additional spillways and additional dikes or, if he ordered more than were necessary, what the proper number would have been.

Claim 10 [paragraph XIV of the petition] is for the removal of waste material from "new" borrow pit. This was done under a separate agreement made by the plaintiff that if the particular borrow pit which it wanted was designated it would remove the waste material free of cost. Plaintiff claims that this agreement was made under duress, but the evidence fails to show the necessary elements to constitute duress and the claim must be denied.

Claims 11, 12, and 13 [paragraphs XV, XVI, and XVII of the petition] have been abandoned.

Claim 14 [paragraph XVIII of the petition] for expense of delay caused by failure to make timely designation of borrow pits is not sustained by the evidence.

Claim 15 [paragraph XIX of the petition] for liquidated damages deducted in making payment is also denied as we have found that the delay was the fault of plaintiff.

In accordance with what has been said above, judgment will be rendered for the plaintiff in the sum of *$415,907.03.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

* (See order, *ante*, p. 171.)

Reporter's Statement of the Case

CUBAN-AMERICAN SUGAR CO., INC., v. THE UNITED STATES

[No. 43206. Decided May 1, 1939; Plaintiff's motion for new trial overruled October 2, 1939]

On the Proofs

Income tax; special assessment; discretion of Commissioner.—Where plaintiff made application for the determination and computation of its profits tax for 1917 under the special assessment provisions of section 210 of the Revenue Act of 1917; the Commissioner allowed the application, computed the tax accordingly, and made a final determination in respect of that year, and thereafter, in 1927, plaintiff filed a claim for refund, which, so far as it was rejected, related entirely to the matter of special assessment and the selection of comparatives used in determining the profits tax for 1917, and such claim for refund was rejected by the Commissioner March 15, 1933, it is held that the action of the Commissioner in granting special assessment and determining the profits tax for 1917 was a final disposition of the matter.

Same.—The discretion exercised by the Commissioner in granting special assessment under section 210 of the Revenue Act of 1917 is not reviewable by the Court.

Same.—The action of the Commissioner with respect to the plaintiff's tax liability for the years 1918 to 1920, inclusive, does not affect the conclusive character of his determination with respect to the tax liability of 1917.

Same.—Where claim for refund was filed January 8, 1920, with an amended return for 1917, before the decision of the Commissioner on special assessment and in connection with certain claims in abatement then pending, it is held that the final decision of the Commissioner on plaintiff's application for special assessment effectively and completely disposed of and denied that claim for refund and the abatement claim.

The Reporter's statement of the case:

Mr. David A. Buckley, Jr., for the plaintiff. *Mr. Harvey L. Rabbitt, Mr. Arthur L. Quinn*, and *Mr. Loring M. Black* were on the brief.

Mr. J. W. Hussey, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant. *Mr. Robert N. Anderson* and *Mr. Fred K. Dyar* were on the brief.

Reporter's Statement of the Case

This suit was instituted to recover $790,115.87, profits tax for the fiscal year ending September 30, 1917. Plaintiff bases its claimed right to recover the alleged overpayment on the ground that, although the Commissioner of Internal Revenue determined and computed the profits tax under the special assessment provisions of section 210 of the Revenue Act of 1917 (40 Stat. 300, 307), the taxpayer is entitled to have its profits tax for that year determined and computed on the basis of a statutory invested capital under the provisions of section 201 of the Revenue Act of 1917 (40 Stat. 300, 303) and to include in such statutory invested capital an amount of $11,000,000 in excess of an invested capital of $28,848,530.85 reported in the return and corrected by the Commissioner in an audit letter mailed to plaintiff on January 3, 1921. After receipt of that letter plaintiff filed an original and amended application for special assessment and the computation of its profits tax for 1917 under the special assessment provisions of section 210 of the Revenue Act of 1917. In his final determination the Commissioner allowed the application and so determined and computed the profits tax, and that determination has never been changed by the Commissioner.

The case is submitted upon the defendant's special answer and plea to jurisdiction in which dismissal of the petition is asked on the grounds (1) that the court is without jurisdiction to inquire into or change the Commissioner's determination based on special assessment, and (2) that, in any event, the suit was barred at the time the petition was filed for the reason that the claim for refund on which it is based was not filed within the time required by law for the filing of such claims.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff filed an original and amended excess profits tax return for the fiscal year ending September 30, 1917, hereinafter referred to as the year 1917. The original return showed a statutory invested capital of $26,774,367.90 and the amended return an invested capital of $27,314,160.57. The original income and profits tax return showed a total

tax of $2,306,928.74 of which $1,975,180.94 represented the profits tax for nine months of the calendar year 1917. The amended return showed a profits tax for this period of $1,949,577.21. With the amended return plaintiff filed on January 8, 1920, a claim for refund of $24,058.88 representing the difference between the total tax of $2,206,853.84, the amount shown to be due on the original return, less certain abatement claims, and $2,182,794.96, the total amount shown to be due on the amended returns, less certain abatement claims. This claim for refund is in evidence as joint exhibit 7 and is made a part hereof by reference. On June 12, 1918, plaintiff paid $2,206,853.84 of the total income and profits tax of $2,306,928.74 shown on the original income and profits tax return and filed its claim for abatement of the balance and, later, in January 1920, a claim for refund of $24,058.88, as stated above. On August 15, 1922, plaintiff paid a further amount of tax of $133.40. Subsequently, as will be hereinafter stated, the Commissioner in his final determination in 1923 denied the claims in abatement and the claim for refund of January 8, 1920, and determined, on the basis of special assessment, a net additional tax of $20,577.52 in excess of the income and profits tax shown upon the original returns. As a result, plaintiff, on October 31, 1923, paid the net additional tax of $20,577.52 and, on December 27, 1923, paid the balance of the original tax of $99,941.50, making the total income and profits tax paid for the fiscal year 1917 $2,327,506.26.

2. After the filing by plaintiff of the original and amended income and profits tax return for 1917, the claims for abatement, and the claim for refund of January 8, 1920, the Commissioner on January 3, 1921, audited the returns for 1917 in connection with the claims for abatement and the claim for refund on a statutory invested capital basis under section 201 of the Revenue Act of 1917, the basis on which the returns had been filed, and made certain changes, increasing the invested capital for 1917 over the amount which the taxpayer had been previously advised in an audit letter of May 29, 1920. In the audit of January 3, 1921, the Commissioner determined an invested capital on the

statutory basis of $28,848,530.85, which was an increase of $5,451,555.54 over the invested capital of $23,396,975.31 of which the plaintiff had been previously advised in the audit letter of May 29, 1920. As a result the Commissioner, in this audit, determined a consolidated net taxable income of $9,614,131.52 and an income tax of $345,657.78, an invested capital of $28,848,530.85, and an excess profits tax for the nine months of the calendar year 1917 of $1,729,541.41, or a total income and profits tax of $2,075,199.19. This amount was $231,729.55 less than the total income and profits tax shown to be due and assessed upon the original income and profits tax return for 1917. And in this audit letter the Commissioner showed the last-mentioned amount as a proposed overassessment.

Thereupon, plaintiff protested this determination and filed an application requesting the Commissioner to determine and compute its profits tax for the period ending September 30, 1917, under the special assessment provisions of section 210, Revenue Act of 1917, and on March 8, 1922, plaintiff filed an amended detailed application and claim for special assessment. This amended application is in evidence as joint exhibit 9 and is made a part hereof by reference. Thereupon the Commissioner entered upon consideration of the plaintiff's application and claim for special assessment and, on May 10, 1923, made a decision and determination with respect to the fiscal year ending September 30, 1917, in which he allowed plaintiff's application for special assessment under section 210 and determined and computed the profits tax for the nine months of the calendar year 1917 under and in accordance with special assessment section 210 of the Revenue Act of 1917. In this determination the Commissioner determined a consolidated net income of plaintiff and its seven affiliated corporations for income-tax purposes of $9,716,786.22 and a consolidated net income for excess profits tax purposes of $9,638,360.61. In applying the special assessment provisions of section 210 of the Revenue Act of 1917, the Commissioner determined a total excess profits tax of $1,990,803.38 for the nine months of the fiscal taxable year falling within the calendar year 1917. In

Reporter's Statement of the Case

this decision and determination the Commissioner advised plaintiff in part as follows:

> Reference is made to your income and excess profits-tax returns * * * for the fiscal year ended September 30, 1917, and your appeal for assessment of the excess-profits tax under the provisions of section 210 of the Revenue Act of October 3, 1917. You are advised that the excess-profits tax for the above-named year has been redetermined under the provisions of section 210 of the Revenue Act of October 3, 1917, in accordance with Articles 18, 24, and 52 of Regulations 41, and the application of the entire excess-profits tax has been computed in connection with the net income of the parent company.

As a result of this decision and determination the Commissioner determined an additional tax of $17,894.36 with respect to plaintiff and certain further additional taxes with respect to certain of the affiliated corporations, and over-assessments as to two of the affiliates. The total net additional tax was $20,577.52 for the group.

Notice of the details of this determination was mailed to plaintiff by registered mail on May 10, 1923, and permitted plaintiff to appeal to the Commissioner, or such agency as he might designate, under the provisions of section 250 (d) of the Revenue Act of 1921. An appeal was taken and after consideration thereof the Commissioner on August 16, 1923, made a final determination in which the prior audit and decision, notice of which had been mailed to plaintiff on May 10, 1923, were sustained and the additional income and profits tax of $20,577.52 so determined was assessed. The audits and decisions of the Commissioner of May 10, 1923, and August 16, 1923, are in evidence as joint exhibits 10 and 11, respectively, and are made a part hereof by reference. These decisions of the Commissioner effectively and completely disposed of and rejected plaintiff's abatement claims and the claim for refund filed January 8, 1920.

The additional tax of $20,577.52 was paid on October 31, 1923, as hereinbefore mentioned, and, on December 27, 1923, plaintiff also paid the balance of the outstanding original assessment due of $99,941.50.

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3. Subsequent to the aforementioned final determination of the Commissioner, the plaintiff, on December 23, 1927, filed a claim for refund for 1917 for "$1.00 and all other amounts refundable." This claim stated two grounds: First, that a refund of $26,417.44 should be made for the reason that under Treasury Decision 3981, promulgated February 23, 1927, in computing income tax for the nine months falling in 1917 there should be credited the entire amount of excess profits tax instead of nine-twelfths thereof; the second ground of this claim for refund was that the Commissioner in computing the profits tax under the special assessment provisions of section 210 in accordance with plaintiff's application had used comparatives not representative of the industry to establish the rate of excess profits tax; plaintiff asked further consideration of the matter of the comparative corporations to be selected and used in the determination of the excess profits tax and that a lower profits tax rate be determined and that refund be made accordingly. On August 14, 1928, the Commissioner made a decision upon the claim for refund and advised plaintiff thereof, in part, as follows:

> Your contention that improper comparatives were used in the determination of your profits-tax liability under Section 210 is denied for the reason that the evidence furnished is not considered sufficient to reconsider the previous determination of your excess-profits-tax liability as shown by Bureau letter dated August 16, 1923.
>
> So much of your claim as pertains to the recomputation under Treasury Decision 3981 is allowed and your tax liability has been redetermined as outlined and explained below. * * *.
>
> In accordance with the above conclusions, your claim for the refund of $1.00 and such other amounts refundable, will be allowed for $19,908.03.

This decision of the Commissioner is in evidence as exhibit 18 and is made a part hereof by reference.

A certificate of overassessment for the $19,908.03 above mentioned was prepared by the Commissioner for abatement, refund, or credit in accordance with the statute but due to various written protests filed by plaintiff between October 3, 1928, and February 1, 1930, with reference to

the comparatives used in determining the profits tax under section 210 of the Revenue Act of 1917 the certificate of overassessment was not mailed to plaintiff until March 15, 1933, on which date a formal schedule rejecting the claim for refund of December 23, 1927, for all amounts in excess of $19,908.03 was issued and signed.

4. Prior to July 6, 1928, the Commissioner had under consideration the matter of the tax liability for the plaintiff for the fiscal years 1918, 1919, and 1920 with respect to which plaintiff had also made application for assessment of its profits tax under the provisions of the special assessment sections 327 and 328 of the Revenue Act of 1918. In a preliminary audit letter dated July 6, 1928, the Commissioner advised plaintiff of his determination in respect of those years, in which determination he applied the special assessment provisions and computed the profits taxes for the years 1918 to 1920, inclusive, under the special assessment provisions. Thereafter plaintiff filed a protest with reference to the determination for these years and hearings were had thereon. Thereafter the Commissioner on February 14, 1930, by a registered notice of his final determination, reversed his earlier action with respect to the years 1918 to 1920, inclusive, and denied plaintiff's application for special assessment and declined to compute the profits tax for these years under the relief provisions of the Revenue Act of 1918 "for the reason that no abnormality in either capital or income has been established as a fact which would justify the Bureau in giving consideration to your application for assessment of your profits tax under the provisions of the above-mentioned acts."

From this 60-day deficiency notice the plaintiff, on February 24, 1930, filed a petition with the United States Board of Tax Appeals for a redetermination of the Commissioner's decision in respect of the years 1918 to 1920, inclusive, assigning as error, among others, the failure of the Commissioner to allow the application for special assessment and to compute the excess profits tax under the relief provisions of the Revenue Act of 1918.

Before the proceedings with respect to the years 1918 to 1920, inclusive, were reached for trial, conferences were held

by plaintiff's representatives with the Special Advisory Committee of the Bureau of Internal Revenue looking to a possible agreement and settlement of the matters in controversy with respect to those years then pending before the Board of Tax Appeals, one of which questions was the matter of special assessment. As a result of these negotiations and conferences which related only to the years 1918, 1919, and 1920, and at no time included any consideration of the fiscal year 1917 as that year was not before the Board or Special Advisory Committee, an agreement to stipulate as to the controversies involved in the proceedings before the Board of Tax Appeals was arrived at. This agreement to stipulate provided, among other things, that—

> The undersigned petitioners hereby agree that they will stipulate with the General Counsel for the Bureau of Internal Revenue to the entry of an order by the United States Board of Tax Appeals redetermining deficiencies in the above-entitled cases on the following basis of settlement: That there be added to invested capital in each of the taxable years [1918, 1919, 1920] the lump sum of $11,000,000, and that no part of such sum be subject to depreciation deductions against gross income in any of the taxable years.

The other item to which the agreement to stipulate related, and which had no reference to the case at bar, concerned inventories of refined sugar as at September 30, 1920. Computations of plaintiff's tax liability for the years 1918, 1919, and 1920 were thereafter made in accordance with the plaintiff's proposed agreement to stipulate and settle all the controversies pending before the Board of Tax Appeals. Decisions were subsequently entered by the Board of Tax Appeals for those years in accordance with the stipulated computations filed with the Board by plaintiff and the General Counsel of the Bureau of Internal Revenue. Thereafter, on April 4, 1933, plaintiff filed with the Commissioner a claim for refund for "$1.00 and such greater amount as is legally refundable" for the fiscal year ending September 30, 1917, on the ground that its income and profits tax liability for the fiscal year 1917 should be determined and computed on the basis of a statutory invested capital rather than under the special assessment provisions of section 210 of the Revenue Act of

1917 by including in its statutory invested capital, as disclosed in its original and amended returns filed and as corrected in the Commissioner's audit letter of January 3, 1921, the additional sum of $11,000,000 agreed to and included in the invested capital for the fiscal years 1918, 1919, and 1920 in the settlement of the controversies pending in those cases before the Board of Tax Appeals.

5. On June 8, 1933, the Commissioner advised the plaintiff that consideration of the claim was precluded by the statute of limitation for the reason that it was filed subsequent to the date on which final action had been taken on the prior claim for refund involving error in the selection of comparatives under section 210 and subsequent to the expiration of the period of limitation for filing valid claims for refund as prescribed in section 284 of the Revenue Act of 1926. (44 Stat. 9, 66.) The taxpayer protested, and, on June 16, 1933, the Commissioner again advised plaintiff that inasmuch as final action had been taken and final decision made on the prior claim for refund and that since the 1927 claim had been formally rejected on March 15, 1933, the claim of April 4, 1933, could not in any manner be considered as an amendment of the prior rejected claim of December 23, 1927, and that registered notice of the disallowance would, accordingly, be issued. Formal notice of the rejection of the claim for refund filed April 4, 1933, was issued and mailed by the Commissioner by registered mail on December 29, 1933.

The court decided that the plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

Upon the facts disclosed by the record it is clear that the plea in bar must be sustained and the petition dismissed. Plaintiff made application for the determination and computation of its profits tax for 1917 under the special assessment provisions of section 210 of the Revenue Act of 1917. The Commissioner allowed the application, computed the tax accordingly, and made a final determination in respect of that year. Thereafter, in 1927, plaintiff filed a claim for refund which, so far as it was rejected, related entirely to the matter of special assessment and the selection of com-

Opinion of the Court

paratives used in determining the profits tax for 1917; that claim was formally rejected by the Commissioner on a rejection schedule signed and issued March 15, 1933. Plaintiff endeavors to make some point of the fact that it had filed a claim for refund on January 8, 1920, which had never been formally rejected. But that claim for refund was filed with the amended return before the decision of the Commissioner on special assessment and in connection with certain claims in abatement which were then pending. The final decision of the Commissioner on plaintiff's application for special assessment effectively and completely disposed of and denied that claim for refund and the abatement claim. *United States* v. *Bertelsen & Petersen Engineering Co.*, 306 U. S. 276. In any event, the refund claim of January 8, 1920, was not such a claim as would be susceptible of amendment by the claim filed April 4, 1933, upon which this suit is based. *United States* v. *Andrews*, 302 U. S. 517. In addition, plaintiff also contends that before the Commissioner on March 15, 1933, formally rejected the refund claim of December 23, 1927, it had pending in the Bureau a protest against previous notices of the Commissioner that no change in the comparatives used for 1917 was justified or would be made, and that the claim for refund on that ground would be rejected; and, in addition, a representative of plaintiff had on March 18, 1930, written a letter addressed to the Commissioner purporting to confirm a conversation of that date with a Mr. Mancil of the Income Tax Unit that further conferences and consideration in connection with the protest against the action on the 1927 claim for refund for 1917 would be postponed until disposition of the question of special assessment with reference to the years 1918, 1919, and 1920, then pending before the Board. The Commissioner never agreed to or acknowledged the purported arrangement between the plaintiff and the employee of the Income Tax Unit. The Commissioner's official action rejecting the 1927 claim for refund on March 15, 1933, was an effective and final disposition thereof and of all protests previously made or then pending before the Bureau. Even if the refund claim of 1927, which related entirely to the comparatives selected by the Commissioner in the determina-

tion of the profits tax under the special assessment provisions of the 1917 Act, was susceptible of amendment by the refund claim of April 4, 1933, based entirely upon a claim for computation of the profits tax for 1917 on the basis of a statutory invested capital, the attempted amendment came too late. A claim for refund cannot be amended after it has been rejected. *Sugar Land Railway Co.* v. *United States*, 71 C. Cls. 628. For these reasons this suit cannot be maintained upon the claim for refund of April 4, 1933, even if plaintiff could otherwise maintain the suit upon the ground set forth in the petition, namely, that its profits tax for 1917 should be determined on the basis of statutory invested capital.

Inasmuch as the suit is one to overturn the final decision of the Commissioner of Internal Revenue determining and computing the profits tax for 1917, under the special assessment provisions of the Revenue Act of 1917, it is clear from the decided cases that this court is without jurisdiction. *Heiner* v. *Diamond Alkali Co.*, 288 U. S. 502; *Welch* v. *Obispo Oil Co.*, 301 U. S. 190; *Central Iron & Steel Co.* v. *United States*, 79 C. Cls. 56; *Bradford & Co.* v. *United States*, 79 C. Cls. 89; *Michigan Iron & Land Co.* v. *United States*, 81 C. Cls. 330; *Roby-Somers Coal Co.* v. *Routzahn*, 100 Fed. (2d) 228. The fact that the Commissioner in determining plaintiff's tax liability for the years 1918 to 1920, inclusive, denied special assessment and later, in order to adjust and settle all controversies pending before the Board of Tax Appeals in respect to those years, included in invested capital for those years an additional lump sum of $11,000,000 did not change or destroy the conclusive character of his final decision and determination with respect to the year 1917 nor does the action taken with respect to the subsequent years constitute conclusive proof as to 1917, or confer upon this court jurisdiction to inquire into, modify, or change the final determination and computation of the tax for 1917. Compare *Western Wheeled Scraper Co.* v. *United States*, 82 C. Cls. 646. The petition must be dismissed, and it is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

C. W. BLAKESLEE & SONS, INC., AND BLAKESLEE-ROLLINS CORPORATION v. UNITED STATES

[No. 43250. Decided May 1, 1939; Plaintiff's motion for new trial overruled October 2, 1939]

On the Proofs

Government contract; knowledge of conditions.—Where contractors in the construction of the substructure of a bridge over the Cape Cod Canal, relied upon borings made by the Government, and made no borings themselves, to determine the subsurface conditions at the site of the work, it is held that the proof does not support the claim that the Government's engineers possessed superior knowledge as to said conditions which was withheld from plaintiffs nor were plaintiffs misled as to said conditions. Pertinent cases cited and applied or differentiated.

Same.—There was no knowledge of impediments to performance known to the defendant which was withheld from plaintiffs and no misrepresentation of conditions existing at the site of the work.

Same.—The defendant having furnished to plaintiffs all the information in its possession in respect to subsurface conditions, without misrepresentation or concealment, is held to be not liable for any loss incurred by plaintiffs in the performance of the work.

The Reporter's statement of the case:

Mr. Mark W. Norman for the plaintiff. *Messrs. Raymond E. Hackett* and *Francis K. Norman* were on the brief.

Mr. George F. Foley, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant. *Mr. Paris Houston* was on the brief.

The court made special findings of fact as follows:

1. C. W. Blakeslee & Sons, Inc., is a corporation of the State of Connecticut.

Blakeslee-Rollins Corporation is a corporation of the State of Massachusetts.

2. November 6, 1933, the War Department publicly invited bids for furnishing all plant, labor, and materials and performing all work required for the construction of the substructure of the Vertical Lift Railway Bridge over the Cape Cod Canal.

Attached to the invitation for bids were the specifications under which the construction was to proceed. Articles 133 and 134 thereof provided:

> 133. *Borings.*—Wash borings have been made under the direction of the contracting officer and of the engineer at various points at the site of the work. Dry samples were obtained. These borings were made in the usual manner and with reasonable care and their locations, depths, and the character of the material apparently encountered have been recorded in good faith on the contract plans. Samples of material obtained from the borings have been preserved and labeled and may be examined at the United States Engineer Office near the Buzzards Bay end of the Canal. There is no expressed or implied agreement that the depths or the character of the material have been correctly indicated and bidders should take into account the possibility that conditions affecting the cost or quantities of work to be done may differ from those indicated.
>
> 134. *Boulders.*—The borings apparently indicate that boulders may be encountered in varying numbers and sizes at any or all of the excavations to be made for the work.

Attached also was a map and chart showing location of the wash borings already made and what they disclosed.

The dispute in this case involves particularly the foundation of the main piers for the bridge, designated as Piers B and C. The piers for the abutments were known as Piers A and D. Wash borings were made for or by the Army engineers at or near the four corners each of the prospective locations of the main piers for the purpose of determining what the nature of the foundations ought to be.

This map and chart was drafted before all the borings had been made and carried the endorsement:

> NOTE TO BIDDERS.—Information on borings taken since this print was made and the actual samples will be available at the Engineer's Office at the Bridge site.

Four out of the five borings charted on the main piers indicated that boulders had been struck.

Copy of the invitation with attachments is filed in the case as plaintiff's Exhibit No. 3, and is made part hereof by reference.

All exploratory borings were completed November 9, 1933, and were wash borings. The completed borings for the main piers showed boulders encountered at two corners of Pier B and at three corners of Pier C. The material otherwise was sand, gravel, and clay.

In addition paragraph 302 of the specifications provided, in part, as to character of work:

> The two main piers shall be of concrete resting on undisturbed natural soil at or below the elevations shown on the contract plans. It is anticipated that the piers will be founded in sand and gravel and that they will not require piles for support.

Article 303, as to method of construction, in part provided:

> The contractor may construct the piers by such method as he may elect, subject to the approval of the contracting officer both as to general method and as to details. Each bidder must describe in his bid, in writing, the general method he proposes to use, and must be prepared at the time of submitting his bid to submit to the contracting officer full information as to the method, and consideration will be given to the method proposed in determining the award of the contract.
>
> * * * * *
>
> For the construction of these piers it is expected that the contractor will elect to use one of two methods, either:
>
> (a) the open cofferdam method, involving the use of steel sheet piling, driven to proper alignment and depth and adequately braced; or
>
> (b) the caisson method, involving the use of a caisson, presumably of the open well type to permit excavation in the open, but with provision for sealing wells and applying compressed air if same be found necessary or desirable.

Article 304 was as follows:

> *Cofferdams.*—If the contractor, subject to the approval of the contracting officer, uses steel sheet pile cofferdams, he must describe his design in his bid. He must assume full responsibility for their successful construction and maintenance.

Article 305 opened with the following paragraph:

> *Caissons.*—If the contractor, subject to the approval of the contracting officer, uses caissons he must describe in his bid the design and his method of sinking the caissons and must assume full responsibility for their successful operation.

and there followed detailed provisions with regard to the construction of the caissons.

Article 706 provided as follows:

> *Character of Material to be Removed.*—The material to be removed is believed to be mostly sand with large and small boulders and gravel and possibly buried logs and other foreign material, and also certain structures. Bidders must study the borings data, examine the site and decide for themselves as to the material to be excavated and the obstacles to be removed.

3. On November 13, 1933, the War Department amended the specifications, raising the elevation of the bottom of the base of the main piers from Elevation 23 to Elevation 38, and postponed the opening of bids from November 20, 1933, to November 29, 1933. The elevations were changed for technical engineering reasons, and the amendment had nothing to do with the presence or absence of boulders.

4. Representatives of the plaintiffs visited the site of the work before they made their estimates or submitted their bid, went to defendant's engineering office there located, and made an examination of the samples taken by the wash borings, the last examination November 22, 1933. Plaintiffs themselves made no borings and relied upon the samples and data of the borings made by or for the Government to inform themselves before bidding as to particular subsurface conditions at the site of the work. To make either wash or core borings around the entire perimeter of the proposed excavations would have been impracticable and too expensive.

Plaintiffs did not have sufficient time to make borings of their own.

The only information or data pertaining to borings that was made available to the plaintiff and prospective bidders

prior to the submission of bids, consisted of the Topographical Map, Sheet 2, annexed to the Invitation (Ex. 3), upon which boring data as to 8 holes appears as therein set forth, and glass bottle samples of materials obtained from the borings at the 12 holes, which were available for inspection at the Engineer's office at the Canal. The glass bottles in which the samples were placed were about 4 inches deep and 1½ inches square and contained specimens of material encountered and taken up at about every five feet in each boring.

Wash-boring maps show only the stratification of the material encountered in making the borings and do not indicate the incidents occurring during the making of the borings. The incidents that occur during the making of the borings are recorded in the log book. This log book was available to plaintiffs but was not consulted by them.

5. The holes at the four corners of Pier B were numbered 3, 4, 5, and 6. At or near hole No. 3 no boulders were encountered by the wash boring. At hole No. 4 a boulder was struck, forced to one side, and passed at Elevation 56.8. At hole No. 5 no boulders were struck. At hole No. 6 a boulder was struck near the surface at Elevation 94, forced to one side, and passed.

The holes at Pier C were numbered 7, 8, 9, and 10. At hole No. 7 a boulder was struck at Elevation 52, shoved aside and passed. At hole No. 8 a boulder was struck, forced to one side, and passed at Elevation 49.8. At hole No. 9 no boulders were encountered. At hole No 10 the rig was shifted three times to avoid boulders at Elevations 80, 79, 50, 43.7, and 40. The shifting of the rig made in reality four holes at location No. 10, numbered 10, 10–A, 10–B, and 10–C. At Elevation 40 a boulder was struck in No. 10 and a new hole, No. 10–A, was started. At Elevation 40, in hole No. 10–A, a boulder was again hit and was dynamited twice, and was washed and drilled for three hours, without result. The rig was then shifted to No. 10–B. There the casing struck a boulder at Elevation 50. The boulder was dynamited, the casing broke off, and the rig was shifted to hole No. 10–C. Boulders were there en-

countered at Elevations 80, 50, 43.7, 40, 35.5, 32, forced aside and passed.

As to excavation of foundations for the abutments, lettered A and D, there were two wash borings made for each, Nos. 1 and 2 for Abutment A, and Nos. 11 and 12 for Abutment D. At hole No. 1 the rig was shifted three times to avoid boulders at Elevations 96, 91, 91.5, 86.5, and 52. Another boulder was struck at Elevation 43.2 where the boring stopped. No boulders were encountered in hole No. 2. In hole No. 11 the rig was shifted because of a boulder at Elevation 80. No boulders were encountered in hole No. 12.

The boulders in the area concerned were of granite.

6. The borings specifications were prepared by the consulting engineers for the Government, Parsons, Klapp, Brinckerhoff & Douglas, who supervised the designing and building of the original Cape Cod Canal between the years 1910 and 1915, and who were familiar with the fact that boulders were distributed throughout the general area of the canal, which fact was also known to the plaintiffs, as plaintiffs, by their officers and employees, had previously been engaged in the construction of the old railway bridge which was located about 75 feet distant from the site of the bridge involved in this case and also had been engaged in the construction of other bridges at the Cape Cod Canal. The engineers in their original specifications prescribed the use of the core-boring method. The defendant's contracting officer rejected their recommendations for the use of the core-boring method and decided to have the borings made by the wash-boring method and thereupon caused wash-boring specifications to be prepared and the work to be undertaken by that method.

In the wash-boring method used, when a boulder was struck and passed, the incident indicated that the casing, a pipe about 2½ inches in diameter was sufficient to thrust the boulder aside, either with or without the assistance of washing around the boulder, and that the boulder was not big enough to seriously interfere with the use of the cofferdam method, hereinafter described. On the other hand, when boulders were struck which had to be dynamited, or that

necessitated shifting of the rig, they were to be considered seriously before undertaking to employ the cofferdam method. The shifting of the rig gave a better idea of the size of the boulder than dynamiting.

In the wash-boring method a stream of water is injected downward, forcing the soil material upward, and it is not designed to penetrate a boulder. In the core-boring method of subsurface exploration, the drill will go through a boulder, cutting out therefrom a core, in the form of a cane or stick, which will give the dimension only of the boulder through the channel of penetration. In the wash-boring method shifting of the rig will give some idea as to the dimension of the boulder horizontally, but not vertically.

The number of holes being limited, as it was, neither method was calculated to disclose the subsurface conditions as they were later found to exist, and neither plaintiff nor defendant had foreknowledge of their existence.

The wash borings in this case were made in the usual manner and accurately reported to the plaintiffs by the defendant. No information concerning the subsurface material obtained while making the borings was withheld from the plaintiffs or otherwise misrepresented to the plaintiffs by the defendant.

7. Plaintiffs submitted a bid of $317,500 for all work within the limits indicated on the contract plans and in the specifications, and $15 per cubic yard for concrete, describing the plant to be used. Their business and technical experience was set forth in the bid as follows:

> C. W. Blakeslee & Sons, Inc., are one of the largest concerns in Southern New England and have been in this heavy construction field for over 60 yrs. & have built bridges in Bridgeport, New Haven, and many large cofferdam projects for sewerage disposal plants.
>
> Blakeslee Rollins Corp. took over the plant and personnel of Holbrook Cabot & Rollins in 1924 and constructed the piers for the New Hudson Bridge at Poughkeepsie, N. Y., and numerous waterfront development projects in Boston, the original company Holbrook Cabot & Rollins built two Naval Dry Docks, one at Brooklyn and one in Boston, as well as Thames River Bridge for R. R. at New London, Bridge over the Piscataqua River at Portsmouth, N. H., bridge So. Portland to Portland, Me., and others.

As the "General Description of Proposed Method of Constructing Main Pier Bases and other Work" plaintiffs in their bid stated:

> We propose to use the open cofferdam method, using 75 ft. steel sheet piling suitably braced for the main piers, with concrete seal placed by submarine buckets.
> Abutments to be built in cofferdams suitably braced; concrete placed in dry.

Copy of the bid is filed as plaintiffs' Exhibit No. 28, and made part hereof by reference.

Eleven contractors other than plaintiffs submitted bids on this work, some proposing the use of the cofferdam method of construction and others the caisson method.

8. Plaintiffs' bid was accepted and a contract was entered into by them with the United States, represented by its contracting officer, R. Park, Lt. Col., Corps of Engineers, War Department, December 7, 1933, whereby plaintiffs agreed to furnish all labor and materials, and perform all work required for the construction of the substructure of the vertical lift railway bridge over the Cape Cod Canal at Buzzards Bay, Massachusetts, in accordance with specifications, schedules, and drawings, the work to commence within 10 calendar days after date of receipt of notice to proceed and be completed within six calendar months after such receipt. The consideration named was that stated in the bid.

The specifications material to this case accompanying the Invitation for Bids were carried into the contract.

Copy of the contract and specifications is filed in the case as plaintiffs' Exhibit No. 27, and is made part hereof by reference.

Plaintiffs submitted their plan of operations and after consultation and revision it was approved by defendant's supervising engineers.

9. The contract provided that the work was to be done under the general direction of the contracting officer and under the detailed direction of Parsons, Klapp, Brinckerhoff & Douglas, consulting engineers to the Government.

The directing engineers favored caissons and recommended to the contracting officer that they be used. The

contracting officer did not favor excluding users of cofferdams from having an opportunity to bid and he accordingly specified in the invitation for bids alternative methods, viz, the cofferdam and the caisson. Plaintiffs in their contract work generally employed cofferdams rather than caissons. When caissons were required they sublet the caisson work. Before the invitation for bids was issued prospective bidders had come to the contracting officer, some desiring the opportunity to bid on the cofferdam method and others on the caisson method, and he desired to be fair to all.

10. Plaintiffs began working before they received word to proceed, and prosecuted the work skillfully and diligently. They started the fore part of December 1933, and finished the latter part of December 1934.

They began on Pier B and Pier C was started at approximately the same time.

Cofferdams were used. The main piers, B and C were 44 by 88 feet and the cofferdams were constructed of interlocking steel sheet piling. Under normal operations the piles would be driven down one after the other in such a manner that the top of them would present a practically even and horizontal line.

The piles, or sheeting as it is sometimes referred to in the testimony, were held up by undersurface obstructions at 10 to 15 feet down.

The cofferdam method of operation entailed first driving the sheeting down around the driving frame and excavating within the enclosure short of the toe of the sheeting, always keeping the toe of the piles or sheeting some 8 to 10 feet down below the excavation.

The sheeting had struck nests of boulders and impacted gravel through which it could not be driven, and plaintiffs resorted to digging or blasting out the boulders and gravel from beneath the toe of the sheeting, thus requiring excavating below the toe.

The farther down the excavation the more bracing was required within the cofferdam, and the boulders were sometimes imbedded in fine running sand. The pressure from the outside increased as the work went down, resulting in

the blowing in of sand and water, or "boils" as they are called. All this made the work slow, difficult, and hazardous.

For this situation the caisson method was better adapted. In the caisson method of subsurface foundations a structural unit ordinarily of concrete or concrete and wood is constructed with a chamber or chambers inside. This unit is lowered by its own or a superimposed weight and by excavating under the cutting edge. In the pneumatic type of caisson the men doing the excavating, work under greater than atmospheric pressure. This pressure is kept equal to or greater than the pressure of the underground water and boulders can be extracted from under the cutting edge of the caisson within limits without the otherwise attendant boils or running in of sand, soil, and water. When the designed depth has been reached the caisson is filled with concrete and left in place. It thus becomes a part of the ultimate pier or other structure.

11. On March 17, 1934, due to delay resulting from these difficulties, plaintiffs' and defendant's representatives had a conference and went down to the bottom of the cofferdam of one of the main piers to examine the situation. On that day plaintiffs applied in writing to the contracting officer for an extension of time for performance, for unforeseeable delay experienced from the boulders encountered, past and future, stating that they were arranging for the use of well-points adjacent to the cofferdams, unwatering the area and making easier the removal of the boulders from under the toe of the sheeting.

On April 7, 1934, the plaintiffs in writing gave notice to the contracting officer of intention to file a claim for additional compensation under Article 4 of the contract, that is, for increase in cost due to changed conditions. The notice recited the fact they were not yet able to get all their sheeting past Elevation 80. April 10, 1934, the contracting officer, in reply, promised to investigate the soil conditions. On the same day, in writing, he directed plaintiffs to place soil test loads on the bottom of the cofferdams, to determine the advisability of the use of piling under the foundations, stating that the soil test at the north abutment indicated

that the natural soil was unsafe for foundations and that piling would there be necessary.

On April 25, 1934, the contracting officer appointed a board of engineers to determine whether under Article 4 of the contract, subsurface conditions were different from those shown on the drawings and indicated in the specifications, and if different, the additional cost. This board appears not to have functioned to any material degree.

There were subsequent conferences between representatives of plaintiffs and of defendant, at which the situation was thoroughly canvassed, and the actual conditions observed and considered.

12. On April 20, 1934, the contracting officer issued Change Order No. 1, as under Article 4 of the contract, relating to "changed conditions," stating that in view of the fact that it had "been determined that in view of conditions unknown at the time of issuing the specifications but discovered during the progress of the work" the contract would be modified by driving oak piles under the base of the north abutment, for which $4,700 additional would be paid.

June 22, 1934, Change Order No. 2 was issued as under Article 3 of the contract, relating to "Changes," changing the drawings and specifications "to provide for pile foundations for the main piers, made necessary because of the character of material disclosed in the excavation," modifying the main piers as follows:

> Unwater the cofferdam, drive the steel sheet piling to not higher than elevation 40 on the channel side, 45 on the shore side, and an average of 42.5 on the ends of the pier, and as much below these elevations as it can be driven without injury, excavate to elevation 50 instead of to elevation 38, drive 324 fifty-foot oak bearing piles under the base with cut-off at elevation 59, construct the base of class "C" reinforced concrete placed in the dry between elevations 55 and 75 instead of constructing it of class "C" concrete deposited under water between elevations 38 and 63, cut the sheet piling at elevation 79 and leave that portion below that elevation in place as a protection to the base instead of pulling and salvaging all sheet piling, omit the distributing slab and modify the shaft, all as shown on plan numbered 3A, and as called for in the specifications attached hereto.

For this work plaintiffs were to receive $76,313 additional.

Again on July 28, 1934, a Change Order was issued, No. 3, reading:

> Under the provisions of Article 3 of the contract the drawings and specifications of the contract as modified by Change Order No. 1, dated April 20, 1934, and Change Order No. 2, dated June 22, 1934, are changed to provide for a lesser depth for such portion of steel sheet piling as has encountered boulders at a depth too great to permit safe removal, as shown on photostat marked "Buzzards Bay R. R. Bridge" dated July 24, 1934, attached hereto.

By this order the contract price as modified by Change Orders Nos. 1 and 2 was reduced by $306.

On September 5, 1934, Change Order No. 4 was issued, as under Article 4 of the contract, stating that it had "been determined that in view of conditions unknown at the time of issuing the specifications but discovered during the progress of the work," the contract would be modified by making certain changes in the base of the south abutment, driving 112 oak piles thereunder. The additional price was fixed at $5,900.

Change Order No. 5 was issued December 18, 1934, to the plaintiffs, stating:

> Under the provisions of Article 3 of the contract the drawings and specifications of the contract as changed by Change Order No. 2 are hereby changed as to the number and type of bearing piles to be driven and to provide for a lesser depth of a portion of the steel sheet piling of the cofferdam of the north main channel pier (Pier C). These changes are made necessary because of the impracticability of driving all the bearing piles to the required penetration and the impracticability of driving all of the steel sheet piling of the cofferdam to the required grades. The drawings and specifications are further changed to provide for leaving in place certain of the steel sheet piling in its full length to protect the present New York, New Haven & Hartford Railroad tracks from erosion and settlement and to provide for temporary use by the United States of a railroad siding on the south side of the Canal.

No change was made in the contract price by this order.

The south abutment was known as Abutment A and the north abutment as Abutment D.

The Government determined upon the use of piles under the bases of piers and abutments because upon excavation the natural soil was found to be unsatisfactory upon which to rest them. The natural soil, moreover, had become disturbed by the removal of boulders and excavation in general. This unsatisfactory condition applied more or less to all the piers and abutments and the use of piling under the foundations was all the more necessary under the main piers, B and C, due to the presence of boulders, nests of boulders, impacted gravel and fine running sand, in extent greater than at the abutments. The unsatisfactory condition of the natural soil for foundation purposes and the extent of boulders and impacted gravel in Piers B and C were not anticipated by either party to the contract.

It is good engineering practice to make the foundations of bridge piers uniform, in order that any settlement may be uniform, and if piling becomes necessary under one pier, it is good practice to have piling under all piers.

When the piles were driven it was necessary to drive them below the originally designated depth for foundations, and a great number of them were used, indicating that the subsoil was not at all what had been expected.

There is no explanation in the record as to why change orders on the abutments were issued as under Article 4 of the contract and on the main piers under a different article, viz, Article 3.

13. There was more sheeting held up by boulders in Pier C than in Pier B, between 30 and 50 per cent in Pier C and 20 and 30 per cent in Pier B. In extracting the boulders from under the toe of the sheeting the excavation in places was brought down 6 to 8 feet below the toe. Removal was difficult. In some instances blister dams were resorted to in order to get at the outside of the boulders. A blister dam is formed of sheeting outside the cofferdam, a small cofferdam in itself, one side of which is the wall of the cofferdam proper, and surrounds the boulder that is giving trouble. When boulders were removed from under the toe

of the sheeting outside pressure tended to and in instances did force in sand and water, making operations dangerous and expensive.

The boulders first hung up the sheeting at Piers B and C when the sheeting had penetrated 10 to 12 feet. When the sheeting had been brought up on an obstacle hard driving caused the toe or top to curl up or broom, become unlocked, or break.

Due to the hazards thus created an excessive amount of bracing had to be placed in the cofferdams, interfering with excavation and increasing the expense.

14. The largest boulder encountered was some 227 tons, in the south wall of Pier C. Along the south wall of Pier C cofferdam the boulders were practically continuous. Plaintiffs in fact came upon nests of boulders, which formed an almost solid block and barrier through which the sheeting could not be driven. Boulders were encountered by the sheeting in Abutments A and D but presented no difficulty not anticipated by the contractors. In Pier C the sheeting was wholly held up, during the course of the driving, 2½ times the perimeter. Conditions were somewhat better in Pier B, but practically the entire sheeting there was held up at one time or another.

Plaintiffs never got down to the required grade either in Pier B or Pier C.

There are filed in the case plaintiffs' Exhibits 49 and 50, which are made a part hereof by reference, and which show by charts the extent of the boulders, their size and location on the perimeters of Piers B and C, and the depths at which they were encountered.

15. Plaintiffs made their estimate for bidding on the assumption that there would be no nesting of boulders, as in fact occurred, but that there would be a fairly uniform distribution thereof. They expected to encounter six or eight boulders on the line of the sheeting in each of the two main piers, each approximately four feet long holding up about three sections of sheeting, which were 16 inches wide. They approximated the expense that would attend such difficulties at $16,000, and embraced it in their bid price. The prospective cost to them of the entire job plaintiffs

calculated at about $288,000. Their anticipated profit was $29,500, the difference between calculated cost and the bid price of $317,500, or a profit of around 10%.

16. Plaintiffs started work on the change orders for the main piers June 16, 1934. Based on the original contract price, and the work done to that time, their earnings at the end of June 15, 1934, on the main piers, amounted to $86,380, which has been paid them.

The entire field work done prior to June 22, 1934, date of issuance of first change order on the main piers, cost the plaintiffs $206,595.21, for which they had estimated $66,-879.14 in their bid price, a claimed loss of $139,716.07. Adding thereto the rate of profit anticipated by them, viz 10%, raises such loss to $153,687.68.

17. The plaintiffs were greatly delayed in the performance of their work, due to the presence of boulders in unexpected quantities and arrangements, and due to other matters, for which the contracting officer granted full extension of time, and no liquidated damages have been assessed, withheld, or collected from the plaintiffs.

18. There is no satisfactory proof as to the prospective cost of excavation calculated according to a fair and reasonable inference as to the sub-surface boulder situation drawn from information available to either party before excavation began.

19. When the change orders were issued it was possible for plaintiffs to continue the excavation to contract depths by the cofferdam method, but if the defendant had insisted upon adherence to the contract a great hardship would have been imposed upon plaintiffs.

The court decided that the plaintiffs were not entitled to recover.

WILLIAMS, *Judge*, delivered the opinion of the court:

Plaintiffs, and the United States, through its contracting officer, entered into a contract on December 7, 1933, whereby plaintiffs agreed to furnish all labor and materials and perform all work required for the construction of the substructure of the Vertical Lift Railway Bridge over the Cape Cod Canal, at Buzzards Bay, Massachusetts, in accordance

with certain specifications made a part of the contract. Under paragraph No. 102 of the specifications the work to be performed was stated to be the construction of two main piers and two abutments for the bridge, together with certain filling, excavation, grading, removal of existing structures, and other incidental work.

It is stated in Article 133 of the specifications that wash borings have been made at various points at the site of the work; that these borings were made in the usual manner and with reasonable care and their locations, depths, and the character of material apparently encountered have been recorded in good faith on the contract plans. It is further stated in Article 133 that there is no expressed or implied agreement that the depths or the character of the material have been correctly indicated and that bidders should take into account the possibility that conditions affecting the cost or quantities of work to be done may differ from those indicated.

Article No. 134 states that borings apparently indicate that boulders may be encountered in varying numbers and sizes at any or all the excavations to be made for the work.

Article 303, as to method of construction, in part provided:

> The contractor may construct the piers by such method as he may elect, subject to the approval of the contracting officer both as to general method and as to details. Each bidder must describe in his bid, in writing, the general method he proposes to use, and must be prepared at the time of submitting his bid to submit to the contracting officer full information as to the method, and consideration will be given to the method proposed in determining the award of the contract.
>
> * * * * *
>
> For the construction of these piers it is expected that the contractor will elect to use one of two methods, either:
>
> (a) the open cofferdam method, involving the use of steel sheet piling, driven to proper alignment and depth and adequately braced; or
>
> (b) the caisson method, involving the use of a caisson, presumably of the open well type to permit excavation in the open, but with provision for sealing wells and applyiny compressed air if same be found necessary or desirable.

Representatives of the plaintiffs visited the site of the work before making estimates of the cost of the work or submitting their bid. They went to the defendant's engineers' office and made an examination of the wash borings made by the defendant. They made no borings themselves but relied upon the samples and data of the borings made by or for the Government to inform themselves before bidding as to the subsurface conditions at the site of the work. It is shown, and we have found, that to make either wash or core borings around the entire perimeter of the proposed excavation would have been impracticable and too expensive, and also that plaintiffs did not have sufficient time to make borings of their own. Plaintiffs in their bid elected to use the open cofferdam method in the prosecution of the work. Eleven contractors other than the plaintiffs submitted bids, some of whom proposed to use the cofferdam method and others the caisson method. The plaintiffs' bid was accepted by the defendant and the contract entered into in accordance with the terms thereof. The defendant's contracting officer approved the method of performing the work proposed by plaintiffs both as to general method and as to details.

The open cofferdam method of operation entails the driving around a driving frame and down to the specified elevation of interlocking steel sheeting. This forms the perimeter of the particular pier to be constructed. The dimensions of the main channel piers were 44 x 88 feet. As the sheeting is driven down, the enclosed area is excavated, and when finally excavated to the required depth, the area is poured with concrete and the pier constructed in it. In the operation, the toe of the steel sheething must always be from 8 to 10 feet below the excavation, and the enclosed area is kept free from water or seepage of other subsurface material.

The plaintiffs commenced work promptly and as the work progressed the presence of boulders and impacted gravel seriously hampered the plaintiffs in the driving of the steel sheet piling. This necessitated the removal of boulders at the bottom or toe of the sheeting, and when this was done the outside pressure caused blow-ins or boils which

filled the cofferdam with sand and water. This delayed the work and made it difficult and hazardous. In March 1934 the plaintiffs and the defendant commenced discussing and studying the situation thus presented. These discussions continued until June 18, 1934, during which time plaintiffs continued their efforts to construct the main channel piers by the cofferdam method. During this time they repeatedly informed the defendant's contracting officer that it would be impossible to complete the work by that method as the nesting of boulders made penetration and the driving of the sheeting to grade impossible. On June 18, 1934, plaintiffs and the defendant substantially reached an agreement that the cofferdam method of construction be abandoned, and a new method of construction with changed plans and altered specifications was adopted. A series of change orders were thereupon issued by the contracting officer in which changes in the method of construction were authorized. As a result of the change orders plaintiffs were relieved from excavating to the originally specified depths and were directed, in lieu thereof, to drive oak piles as a foundation for the channel piers. On the receipt of these change orders plaintiffs proceeded with the work under the changed method and completed it promptly and efficiently, without any excess cost beyond that other than as provided in the change orders themselves.

Plaintiffs started work on the change orders for the main piers June 16, 1934. Based on the original contract price and the work completed at that time, apportioned to the total amount to be done to form the complete structure, their earnings on the main piers, as shown by the United States engineers' certificates and vouchers of payment, amounted to $86,380. The actual cost of the work to them on the piers up to this time was $206,595.21, for which they had estimated $66,879.14 in their bid, a claimed loss of $139,716.07. Adding to this amount their anticipated rate of profit of 10%, raises the loss to $153,687.68. Plaintiffs seek to recover the amount of this loss, which it is contended was the excess cost of completing that portion of the entire job that was completed up to the date of the first change order, over and above what would have been the cost of

completion to that date, if the subsurface conditions at the site of the work had been such as they had a right to assume they would be from the defendant's representations.

The basis of plaintiffs' claim is that the defendant's responsible officers in inviting bids for the work made various deceptive and misleading representations as to the subsurface conditions at the site of the piers; that plaintiffs relied on these deceptive and misleading representations in the submission of their bid and in the proposal to use the cofferdam method in constructing the channel piers, and that the loss claimed resulted directly therefrom; that these deceptive and misleading representations had to do with the subsurface conditions at the site as affirmatively set forth in the invitation to bid and in the specifications, and also the failure of the contracting officer to inform plaintiffs and prospective bidders as to material facts within the defendant's knowledge with respect to the subsurface conditions likely to be encountered in the prosecution of the work, which, if known to the plaintiffs, would have materially controlled them in the submission of their bid.

It is claimed by plaintiffs that the defendant failed to inform them of the existence of material facts in respect to the subsurface conditions at the site of the work prior to the submission of their bid, all of which were in the knowledge and possession of the defendant, as follows: (1) That the defendant's consulting engineers, Parsons, Klapp, Brinckerhoff, and Douglas, who had supervised the building of the original Cape Code Canal in the years 1910 to 1915, had recommended to the contracting officer that the core-boring method be used in testing the subsurface conditions and that the caisson method only be adopted for the construction of the channel piers; (2) that prior to the submission and acceptance of their bid considerable quantities of dynamite were used by the defendant in the making of the wash borings; and (3) that throughout the year 1933 another contractor was engaged in widening the canal throughout the greater part of its length; that it had considerable difficulty in the prosecution of its contract due to the fact that it was encountering boulders and boulder conditions, making it difficult for it to carry on the work, and

that within a few days after the invitation for bids had been issued in this case, the contractor abandoned the prosecution of its work under the contract.

It is urged by plaintiffs that the consulting engineers, by reason of the fact that they had superintended the construction of the original canal, possessed superior knowledge as to the subsurface conditions throughout the area of the canal and knew that boulders large and small were distributed throughout the entire area, and that their recommendations that the core-boring method be used in testing the subsurface conditions at the site of the work and that the caisson method be used in the construction of the piers were based on this superior knowledge, all of which, if made known to the plaintiffs, would have influenced their judgment to the extent that they would neither have submitted a bid nor undertaken to construct the main channel piers by the cofferdam method.

The proof does not support the claim that the consulting engineers of the defendant possessed superior knowledge as to the distribution of boulders throughout the area of the canal or at the site where the piers in question were constructed. They knew, of course, that boulders large and small were distributed throughout the entire area of the canal and that they might be encountered at any point in varying numbers and sizes. This knowledge was likewise in the possession of plaintiffs. One of the officers of the plaintiff companies had been engaged in the vicinity of the proposed bridge in work similar to that called for in the present contract and in the construction of the old railroad bridge approximately 75 feet distant from the piers involved, and also in construction of other bridges at the Cape Cod Canal some distance from the site of the present work. The plaintiffs possessing the same knowledge in respect to the distribution of boulders throughout the area of the canal as that possessed by the consulting engineers of the defendant were therefore neither damaged nor misled by the failure of the contracting officer to inform them as to the recommendations made by the consulting engineers as to the methods that should be adopted in the performance of the work.

In respect to the contention that plaintiffs were misled by the failure of the defendant to inform them that dynamite was used to get by boulders while making the borings it need only be pointed out that wash-boring maps show only the stratification of materials in various holes shown on the plans and do not show the methods employed in getting the borings down. The method of making the borings and the fact that dynamite was used and similar information is recorded in the log book. Plaintiffs knew this but made no effort to consult the log book, which was available to them. Plaintiffs therefore have no one but themselves to blame for the fact that at the time they submitted their bid they did not know that dynamite had been used by the defendant in making the borings and can not be heard to complain that they were misled or damaged by the defendant because of that fact.

The further contention that plaintiffs were misled by the failure of the contracting officer to inform them of the boulder difficulties then being encountered by a dredging contractor in widening and deepening the canal at another point is without merit. Plaintiffs knew that boulders were distributed throughout the entire area of the canal and were liable to be encountered at any point. This information if imparted would have added nothing to the knowledge already possessed by plaintiffs and would in no way have aided them in reaching a conclusion as to what the situation in respect to the presence of boulders might be in this case.

Plaintiffs were informed in the specifications for the work which accompanied the invitation to bid that wash borings had been made under the direction of the contracting officer and the engineers at various points at the site of the work and that dry samples had been made. They were experienced contractors and knew what the wash-boring method was. They were further informed in Article 134 of the specifications that borings apparently indicate that boulders may be encountered in varying numbers and sizes at any or all the excavations to be made for the work. They were further informed in Article 706 of the specifications that the material to be removed is believed to be mostly sand with

large and small boulders and gravel, and possibly buried logs and other foreign material, and also certain structures. Bidders were also advised in this article of the specifications that they must study the borings data, examine the site and decide for themselves as to the material to be excavated and the obstacles to be removed.

Plaintiffs base their right to recover on the decisions in *Hollerbach* v. *United States*, 233 U. S. 165; *Christie* v. *United States*, 237 U. S. 234; *United States* v. *Atlantic Dredging Co.* 253 U. S. 1; *United States* v. *Smith*, 256 U. S. 11, and *Levering & Garrigues Co.* v. *United States*, 73 C. Cls. 566.

In *Hollerbach* v. *United States*, *supra*, the claimants brought suit upon a contract for the repair of a dam in Green River, Kentucky. The case turned upon the question of the right of claimants to recover because of certain damages suffered by them which would not have accrued had the dam been backed with broken stone, sawdust, and sediment, as was stated in the specifications attached to the contract. As claimants proceeded with the work it was found that the dam was not backed with broken stone, sawdust, and sediment, as stated in the specifications, and below 7 feet from the top to the bottom there was a backing of cribbing of an average height of 4.3 feet consisting of sound logs filled with stone. This made the cost of the work much greater than if the representation inserted by the Government in the specifications had been true. It was held that the claimants, upon these facts, were entitled to recover.

In *Christie* v. *United States*, *supra*, claimants sought to recover damages due under a contract with the United States for the construction of 3 locks and dams on the Warrior River in Alabama. One of the items of the contractor's claim was for extra expenses incurred by claimant in the pile driving and the work of excavation on account of misrepresentation by the defendant of the materials to be penetrated and excavated. It was stated in the specifications, among other things, that "the material to be excavated, as far as known, is shown by the borings, draw-

ings of which may be seen at this office, but bidders must inform and satisfy themselves as to the nature of the material." The drawings "showed gravel, sand, and clay of various descriptions and showed no other material." It developed during the progress of the work that the material to be excavated consisted largely of stumps below the surface of the earth, buried logs, cemented sand and gravel, and sandstone conglomerate, which materials were far more difficult and expensive to penetrate and excavate than ordinary sand and gravel such as was described in the drawings. It was alleged in the petition that "the existence of the more difficult and expensive material was known to the persons who made the borings and to the resident engineer of the United States under whose supervision they were made; and that the statement in the specifications was untrue in fact and misleading, causing the claimants to propose to do the work upon the basis shown by the drawings and not upon the basis of the more difficult and expensive work, which in point of fact existed and was known to the officers of the United States. * * * That the erroneous and deceptive drawings misled claimants and they were compelled to spend $10,510.30 over and above the rates named in their proposal and contract, which rates were based upon the materials shown by such drawings." The court held that these allegations were substantially sustained and awarded claimant a judgment.

In *United States* v. *Atlantic Dredging Co.*, *supra*, the claimant entered into a contract with the Goverment for certain dredging operations in the Delaware River. The specifications and the map attached thereto showing tests made by the defendant as to the character of the material to be dredged described the material to be "mainly mud or mud with admixture of fine sand," whereas the material to be dredged was in fact different and more difficult and expensive to dredge than that described in the specifications. The specifications were deceptive and misleading in that the test borings gave information to the Government, not imparted to bidders, of materials more difficult and expensive to excavate than those shown by the specifications and map. The claimant was awarded judgment.

In *United States* v. *Smith*, *supra*, claimants entered into a contract with the Government in which they agreed to excavate a ship channel 21 and 22 feet deep, located in section 8 of the Detroit River, in accordance with specifications attached to and made a part of the contract, for the sum of 18 cents per cubic yard of excavation. The specifications stated that the material to be removed consisted of clay, sand, gravel, and boulders, all in unknown proportions. In the prosecution of the work the claimants encountered a natural bed of limestone rock, a material entirely different from that described in the specifications. The claimants protested against excavating and removing the limestone rock and requested that an extra price be fixed for doing this work. The defendant refused to fix any other price than that called for in the contract and required the claimants to complete the work at the contract price. The claimants by reason of the removal of this material sustained a substantial loss which the court held they were entitled to recover.

In *Levering & Garrigues* v. *United States*, *supra*, the claimant, a corporation, entered into a contract to construct, at the United States Naval Academy, Annapolis, Maryland, an addition to an existing power house. The building was to be erected of reinforced concrete on a pile foundation. In driving the piling necessary to complete the work claimant encountered a sunken sea wall which greatly retarded and increased the cost of the work. This sunken sea wall was not shown on the plans and specifications for the work submitted to claimant although its presence was known to the defendant at the time the plans and specifications were submitted. The court held that the defendant misled the claimant as to the existence of the buried obstruction beneath the surface of the ground where the piles were driven and was liable to plaintiff for the extra cost incurred in doing the piling work occasioned by such obstruction.

It is clear that the facts in the cases cited and relied upon by plaintiffs are distinguishable from the facts shown in the instant case. We have found that the borings in this case were made in the usual manner and accurately reported to the plaintiffs and that no information concern-

ing the subsurface material obtained while making the borings was withheld from plaintiffs or otherwise misrepresented to them. This finding is abundantly supported by the evidence.

In each of the cited cases claimants were misled by inaccurate and deceptive specifications on which they had a right to rely in submitting their bids. Such was not the situation in the case before us. There was no knowledge of impediments to performance known to the defendant which was withheld from plaintiffs, and no misrepresentation of conditions existing at the site of the work. Seven out of the twelve borings made by the defendant disclosed the presence of boulders and plaintiffs were forewarned in the specifications that boulders large and small might be encountered at any point of the work in constructing the piers. Plaintiffs expected to encounter boulders during the progress of the work and took this fact into consideration in estimating the cost of the work before submitting their bid. That they underestimated the difficulties encountered because of the presence of boulders at the site of the work is quite evident and is indicated by the fact that out of the twelve bids submitted theirs was the lowest. This fact, however, under the rule long and uniformly laid down by the courts, cannot avail them in their claim for damages because of the increased cost of the work over what they estimated it would be in the submission of their bid.

The defendant having furnished to plaintiffs all the information in its possession in respect to the subsurface conditions existing at the site of the piers, without misrepresentation or concealment in any respect, is not liable to plaintiffs for any loss incurred by them in the performance of the work.

The case, we think, falls within the decisions in *MacArthur Brothers Co.* v. *United States*, 258 U. S. 6; *Trimount Dredging Company* v. *United States*, 80 C. Cls. 559; *Simpson & Co.* v. *United States*, 31 C. Cls. 217 (affirmed 172 U. S. 372); *Midland Land & Improvement Co.* v. *United States*, 58 C. Cls. 671, and *General Contracting Corporation* v. *United States*, 88 C. Cls. 214, and is controlled by them.

This court in *Midland Land & Improvement Co.* v. *United States*, *supra*, in discussing the rule laid down in the decisions as to misrepresentations said:

> The burden of proving misrepresentation rests upon the party making the allegation. It is not to be presumed, and one may not, either under the *Christie* or *Hollerbach case*, simply show a different condition in *some* respects from that which the chart or blue prints of borings discloses, and rest his case upon the theory that the court must infer a misrepresentation. There must be some degree of culpability attached to the makers of the maps and charts, either that they were knowingly untrue or were prepared as the result of such a serious and egregious error that the court may imply bad faith. The many contract cases in this court, too many to cite, sustain this principle.

In the recent case of *General Contracting Corporation* v. *United States*, *supra*, the court said:

> A misrepresentation of the character of the one relied upon by plaintiff must be one that actually misleads the party aggrieved, * * *. We have no record showing that the drawings were false so far as they went. There is no proof of record that any official of defendant registered a condition, as disclosed by a boring, that was false. In order to sustain misrepresentation it must be proven that the defendant's official made a boring and found a certain condition and did not register exactly what was found, but, on the contrary, registered a different condition from what the boring showed.

It follows that plaintiffs are not entitled to recover, and it is ordered that the petition be dismissed.

WHALEY, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

Syllabus

AMOS D. CARVER v. THE UNITED STATES

[No. 42716. Decided May 29, 1939; Plaintiff's motion for new trial overruled October 2, 1939]

On the Proofs

Income and excess-profits tax; claim for refund following determination by Board of Tax Appeals.—Where, upon a stipulation by the parties, the United States Board of Tax Appeals on August 25, 1928, entered an order deciding that upon redetermination of plaintiff's tax liability for the year 1917, there was an overpayment of the amount in suit and from said order no appeal was ever taken, and where on November 12, 1928, the Commissioner signed a schedule of overassessments including one in plaintiff's favor but showing the said amount in suit barred by the statute of limitations, under the provisions of Section 507 of the Revenue Act of 1928, it is held that since a timely claim for refund had not been filed under Section 284 (g) of the Revenue Act of 1926, plaintiff is not entitled to recover.

Same; letter of inquiry not an informal claim for refund.—A letter of inquiry, which does not ask for a refund and makes no claim that plaintiff is entitled to a refund, is not an informal claim which might afterwards be perfected.

Same; suggested change in computation not an informal claim.—A mere suggestion of a change in the computation of a tax does not constitute an informal claim for refund.

Same; right of recovery subject to statutory restrictions.—The decision of the United States Board of Tax Appeals is final as to the amount of overpayment and may become the basis of a suit to recover the amount thereof, but the right of recovery in cases such as the one in suit is subject to certain statutory restrictions.

Same; suit upon decision of the Board of Tax Appeals.—Where the Board of Tax Appeals determines an overpayment and no question of credits is involved, and the refund of the overpayment is not barred by the statute of limitations at the time of the Board's decision, suit may be brought within six years from the date of the Board's decision. *National Fire Insurance Co. v. The United States*, 72 C. Cls. 663, 669, and similar cases cited.

Same.—The jurisdiction of the Board of Tax Appeals extends "only to the determination of the fact of overpayment and the amount thereof," but the right to sue for the overpayment in such cases depends upon Section 284 (e) of the Revenue Act of 1926, as amended by Section 507 of the Revenue Act of 1928. *National Fire Insurance Co., supra.*

Reporter's Statement of the Case

Same.—"The right to recover is dependent upon whether a timely and sufficient claim for refund was filed," in such cases. *National Fire Insurance Co., supra*.

Same.—In the instant case, it having been held that the so-called informal claim was not in fact any claim for refund whatever, it follows that the provisions of Section 284 (g) of the Revenue Act of 1926 were not complied with and that the plaintiff cannot recover upon the finding and determination of the Board of Tax Appeals.

Same; certificate of overassessment by Commissioner.—Refund of the overpayment as stated in the certificate of the Commissioner is, in the instant case, barred for the same reason that an action upon the finding of the Board of Tax Appeals was barred; the certificate was brought about by the decision of the Board, and was merely a restatement of the Board's finding.

Same; account stated.—An account stated gives rise to an implied promise to pay the indebtedness set forth, but "recovery on this implied promise to pay may be barred by lapse of time" and it may also be barred by an express statutory provision. *Goodenough, Trustee, v. United States*, 85 C. Cls. 258, 299, cited.

The Reporter's statement of the case:

Mr. Francis R. Lash for the plaintiff. *Mr. C. Leo DeOrsey* was on the briefs.

Mr. John A. Rees, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. Plaintiff is, and during all the times material hereto was, a citizen of the United States, a resident of New York, New York, and a member of a partnership known as Baker, Carver & Morrell (hereinafter referred to as the "partnership"), engaged in the business of selling railroad, steamship, and marine supplies at Number 39–41 Water Street, New York, New York. That partnership was organized about 1894 and Mr. Baker died sometime prior to 1917. Thereafter, and particularly during the year 1917, the partnership was continued at the same location and under the same name by the plaintiff and Joseph B. Morrell as equal partners.

2. The partnership filed its income and profits tax return for the calendar year 1917 on March 28, 1918, reporting

thereon an invested capital of $1,121,365.12; a taxable net income of $499,387.91; a partnership excess profits tax of $163,868.93; and a balance of $335,518.98 as net profit to be shared equally by the two partners. That return also reported salaries paid to the two partners in equal amounts of $87,500 each. The excess profits tax of $163,868.93 was timely assessed and paid and is not in controversy herein.

Treasury Department Form 1065, on which the partnership reported its income and profits tax liability for the year 1917, contained the following marked spaces:

I. Total of Items G and H	$499, 387. 91
J. Less excess profits tax, if any, for taxable year	163, 868. 93
K. Net income to be shared by partners	335, 518. 98

3. After a field examination by a revenue agent and upon the basis of his report dated June 14, 1919, the Commissioner of Internal Revenue timely assessed on his August 1919 list an additional excess-profits tax of $126,060.55 against the partnership. Notice and demand therefor was issued on November 10, 1919.

During the years 1917 to 1926, inclusive, Edward S. Greene was the duly appointed and acting attorney-in-fact for the partnership and for each of the two partners individually, in all their Federal tax matters pertaining to the calendar year 1917.

In a letter dated November 21, 1919, the partnership, acting through Greene as general manager, and attorney-in-fact, acknowledged receipt of that notice and demand dated November 10, 1919, and asked for an extension of ten days in which to file a claim for abatement of the additional tax. On November 25, 1919, the partnership, acting through Greene as general manager and attorney-in-fact, filed a tentative claim for abatement and on December 4, 1919, Greene filed a supplemental claim for abatement on its behalf to which there was attached a six-page typewritten brief and protest against the revenue agent's report stating in substance that the additional assessment resulting therefrom was erroneous and excessive. In a letter dated January 7, 1921, the chief field deputy in the office of the collector of internal revenue advised the partner-

ship that he had been directed to take steps to satisfy the Government's claim for $126,060.55 tax for 1917.

In a letter dated March 11, 1921, the Commissioner of Internal Revenue advised the partnership that its claim for abatement had been considered and certain items allowed, resulting in an increase in taxable net income as reported upon its return from $499,387.91 to $544,488.87 and in a decrease of invested capital from $1,121,365.12 to $921,365.12; that a computation of tax liability upon the basis of these adjusted figures disclosed a tax of $214,929.49, resulting in an overassessment of $74,999.99. This letter concluded with a statement that the claim for abatement was therefore allowed for $74,999.99 and rejected as to $51,060.56. Since no part of the additional assessment of $126,060.55 had been paid, the overassessment of $74,999.99 was abated.

4. On May 13, 1921, Greene, as attorney-in-fact for the partnership and plaintiff, signed and mailed in a properly addressed and stamped envelope a letter acknowledging the receipt of the letter of the Commissioner of Internal Revenue dated March 11, 1921. The letter so mailed by Greene objected to the computation of tax liability made by the Commissioner for several reasons, asked to have the demand thereon deferred, and contained the following statement:

> (6) A change in the excess profits' tax of the firm for 1917 affects the excess profits' credit on the returns of the individual partners for that year. Would it be possible to have the credit due them, i. e., Mr. Joseph B. Morrell and Mr. Amos D. Carver, on their returns on this account taken care of at the same time?

Neither the original of this letter nor any copy thereof can now be found in the administrative files of the Bureau of Internal Revenue or in the office of the collector of internal revenue for the district in which the partnership and plaintiff's returns were filed.

By letter dated June 6, 1921, the Commissioner replied to the partnership's previous inquiry bearing upon its claim for abatement of additional taxes for 1917.

5. In a letter dated May 22, 1923, addressed to the Commissioner by Greene, reference was made to the then out-

standing and unpaid balance of $51,060.56, the remaining portion of the additional tax assessed on the August 1919 list referred to in finding 3. This letter for the first time requested that the profits-tax liability of the partnership for the calendar year 1917 be redetermined upon the basis of special assessment under the provisions of Section 210 of the Revenue Act of 1917. (40 Stat. 300, 307.)

By letter dated February 5, 1924, the Commissioner advised that the request for special assessment could not be entertained for the reason that it was not timely filed. In response to a brief and protest filed on or about February 11, 1925, the Commissioner reconsidered that action with the result that the partnership's claim for special assessment was allowed, and its tax liability for 1917 was redetermined under the provisions of Section 210 of the Revenue Act of 1917. By letter dated August 14, 1925, the Commissioner advised that the reaudit under special assessment disclosed the following:

Net income		$544, 488. 87
Excess profits tax, Section 210		161, 005. 37
Tax assessed, Original return, Account #2800540	$163, 868. 93	
Additional assessment, August 1919, page 1, line 2	126, 060. 55	
Total assessments	289, 929. 48	
Less: Amount abated	74, 999. 99	
		214, 929. 49
Overassessment		53, 924. 12

Such letter also included the following statement:

> Inasmuch as your informal claim for assessment under the provisions of Section 210 was filed on May 22, 1923, that portion of the overassessment in the amount of $2,863.56 which applies against the tax assessed under the restrictions of Section 281 (e) of the Revenue Act of 1924 can not be refunded.

Thereafter and on or about January 16, 1926, a certificate of overassessment was delivered to the partnership showing a net overassessment for 1917 of $51,060.56 to have been

abated. This disposed of the remaining unpaid balance of $51,060.56 of the additional partnership profits tax assessed as aforesaid on the August 1919 list.

The allowance of special assessment and the resulting reduction in the profits tax liability of the partnership, as aforesaid, also resulted in a change in the distributive shares of the two partners which were recomputed as follows:

Taxable net income		$544, 488.87
Less: Excess profits tax		161, 005. 37
Amount to be distributed		383, 483. 50
Joseph B. Morrell (50.27%)	$192, 777. 16	
Amos D. Carver (49.73%)	190, 706. 34	
		383, 483. 50

Although these two men were, as hereinbefore stated, equal partners and entitled to share equally in the partnership profits, certain adjustments by way of interest were made to compensate each for the use by the partnership of prior years' profits not withdrawn and for withdrawals in excess of salary and accumulated earnings.

6. Plaintiff filed his individual income tax return for the calendar year 1917 on March 30, 1918, reporting thereon a total gross income of $276,626.75; a total taxable net income of $231,349.03; and a tax thereon of $68,389.98, which was paid on June 5, 1918. A portion of this sum is sought to be recovered in the instant suit.

Plaintiff's gross income of $276,626.75, reported as aforesaid, included the sum of $166,739.84 as his distributive share of the net profits of the partnership of Baker, Carver & Morrell. As shown in finding 2, that partnership had reported taxable net income of $499,387.91, a partnership profits tax of $163,868.93, and the balance of $335,518.98 as distributable net income to be shared equally by the two partners. Plaintiff's share was one-half and would have been $167,759.49. He actually reported only $166,739.84, as aforesaid, and the apparent explanation for his failure to include the difference of $1,019.65, although not considered material to any controverted issue, is that it probably represented an interest adjustment as explained in the last paragraph of finding 5.

Treasury Department Form 1040, on which the plaintiff reported his income and profits tax liability for the calendar year 1917, did not contain any marked space or instructions for the credit provided for by section 29 of the Revenue Act of 1916, as amended by the Act of October 3, 1917, 40 Stat. 337.

In determining and reporting his taxable net income and the tax due thereon, plaintiff did not take as a credit against his net income his proportionate share of the partnership's excess profits tax although, as shown in finding 5, the partnership's taxable net income had been reduced by that tax in determining the partnership profits distributable and taxable to him.

7. After a revenue agent's examination and report dated March 26, 1919, the Commissioner of Internal Revenue determined and allowed an overassessment of $5,088.08 in plaintiff's tax liability for 1917. This overassessment was found to be an overpayment and was applied in full as a statutory credit to an outstanding additional tax due from the plaintiff for the calendar year 1916.

8. Pursuant to a waiver executed by plaintiff and dated March 12, 1925, which was received by the Commissioner of Internal Revenue on March 14, 1925, and accepted in writing, a so-called 30-day letter was addressed by him to the plaintiff on March 28, 1925, proposing a deficiency of $22,214.02 in plaintiff's tax liability for 1917. This letter was superseded by a further 30-day letter addressed to the plaintiff on August 26, 1925, proposing a deficiency of $31,137.75 in his tax liability for that year. On October 14, 1925, a so-called 60-day letter was addressed to the plaintiff showing, for the year 1917, "the determination of a deficiency in tax of $31,137.75, as shown in Bureau letter dated August 26, 1925." That amount was assessed upon the Commissioner's January 1926 list. Thereafter and on December 8, 1926, the Commissioner sent to plaintiff, by registered mail, another 60-day letter also showing a determination of the deficiency of $31,137.75 "as shown in Bureau letter dated August 26, 1925, and attached statement." The statement advised plaintiff in detail of the computation of his tax liability and showed, among other things, that it was based upon a determined net income of $288,918.52 which

included $190,706.34 as his share of the net profits of the partnership of Baker, Carver & Morrell, computed as shown in finding 5.

9. From the Commissioner's determination of deficiency, set forth in his letter of December 8, 1926, plaintiff filed a timely appeal with the United States Board of Tax Appeals on February 7, 1927. On June 11, 1928, and before the Commissioner had taken any action with reference to the plaintiff's request, set out in paragraph 6 of the letter of May 13, 1921, plaintiff's duly appointed and acting attorney-in-fact addressed a letter to the General Counsel, Bureau of Internal Revenue, wherein he proposed that the pending appeal be settled upon the basis of a recalculation of plaintiff's tax under a ruling promulgated February 4, 1927, known as Treasury Decision 3971, C. B. VI-1, 246 (1927).

The plaintiff's attorney-in-fact wrote a further letter to the General Counsel, dated July 30, 1928. His offer was accepted and approved by the General Counsel and a redetermination of plaintiff's tax liability was made upon the basis of the net income, as shown in the 60-day letter, reduced by $80,502.69, being one-half of the partnership profits tax of $161,005.37, determined as shown in finding 5. That computation showed plaintiff's corrected tax liability of $59,487.63, a net payment of $63,301.90 on June 5, 1918, as shown in finding 6, and an outstanding and unpaid assessment of $31,137.75. On August 22, 1928, counsel for the respective parties filed a stipulation with the Board agreeing that a correct determination of plaintiff's tax for the year 1917 disclosed an overpayment in the amount of $3,814.27. Pursuant to that stipulation the Board, on August 25, 1928, entered the following order in plaintiff's case from which no appeal was taken:

ORDERED and DECIDED: That, upon redetermination, there is an overpayment for 1917 of $3,814.27.

10. From and after the date on which the plaintiff's return for the year 1917 was filed, and continuing until February 4, 1927, the Commissioner had held that the distributive income of every partnership for the year 1917, a propor-

tionate part of which was taxable to each of its partners, should be determined by reducing the partnership's taxable net income by the excess-profits tax imposed thereon and that the balance remaining (distributive income) should then be allocated to the partners upon their individual returns. However, he further held, at that time, that after thus allocating the partnership's distributive income to the partners, no credit should be allowed them upon their individual returns for their proportionate shares of the excess-profits tax imposed upon and paid by the partnership.

On February 4, 1927, such practice of the Commissioner was changed with the promulgation of Treasury Decision 3971, C. B. VI–1, 246 (1927), containing a ruling that, in accordance with the decision of the Court of Appeals, Second Circuit, in *Reid* v. *Rafferty*, 15 Fed. (2d) 264, not only should the partnership's taxable net income be reduced by the excess-profits tax thereon, in determining the balance available for distribution to the partners, but in addition each partner should receive as a credit against the net income upon his individual return his proportionate share of such excess-profits tax.

The recomputation of plaintiff's tax liability made in connection with the settlement of his appeal to the Board, as shown in finding 9, was in accordance with the practice under Treasury Decision 3971, *supra*.

11. The additional tax and deficiency of $31,137.75, assessed against plaintiff on the January 1928 list, as shown in finding 8, was in part satisfied and collected by statutory credits of overpayments of $20,273.12 and $9,369.92, made by plaintiff for the years 1918 and 1919 respectively, amounting to a total of $29,643.04. Those credits were made October 10, 1928.

On a schedule of overassessments signed November 12, 1928, the Commissioner abated in full the above-stated deficiency and on November 28, 1928, delivered to plaintiff a certificate of overassessment reading in part as follows:

Overassessment	$34, 952. 02
Barred by statute of limitations	3, 814. 27
Overassessment allowable	$31, 137. 75

Opinion of the Court

The certificate of overassessment was contained in a letter stating in substance that the overpayment found was barred by the provisions of subdivision (e) of section 284 of the revenue act of 1926, as amended.

The credits of $20,273.12 and $9,369.19, above mentioned were subsequently reversed by the Collector of Internal Revenue, upon instructions from the Commissioner, and those amounts, as 1918 and 1919 overpayments, were repaid to plaintiff, with interest thereon, by Treasury check dated December 19, 1928, in the sum of $46,029.73.

12. On October 7, 1932, plaintiff filed with the Collector of Internal Revenue for his District a claim for refund in the amount of $29,643.04, based in part on the facts above stated. This claim was disallowed by the Commissioner on a schedule dated December 11, 1933, and plaintiff was so advised by letters dated November 24, and December 11, 1933. This claim is now abandoned.

13. No part of the overpayment of $3,814.27, found by the Board of Tax Appeals, has been repaid to plaintiff.

The court decided that the plaintiff was not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

This action involves income taxes which became due more than twenty years ago but which was only submitted to this court at the last term thereof. If the proceedings since the tax was assessed had at certain stages thereof received a tithe of the attention given to the case since the action was begun in 1934, the result would probably have been quite different. Indeed, it is possible there would have been no suit whatever.

The plaintiff filed his individual Federal income tax return for the year 1917 on March 30, 1918, reporting thereon a tax of $68,389.98 which was paid June 5, 1918. The income reported included plaintiff's share of the net profits of the partnership in which the plaintiff and Joseph B. Morrell were equal partners.

During 1921 a Mr. Greene was attorney in fact for the partnership and the plaintiff and on May 13, 1921, he mailed

a letter to the Commissioner of Internal Revenue duly stamped and addressed. This letter contained a statement which plaintiff contends amounted to an informal claim for refund. This statement will be hereinafter set out and considered.

On May 22, 1923, Greene addressed another letter to the Commissioner in which he referred to the outstanding and unpaid balance of $51,060.56 and asked that the partnership's profits tax liability be redetermined on the basis of special assessment. The Commissioner first denied this request and then after receipt of a brief and protest filed about February 11, 1925, allowed the special assessment and redetermined the profits tax liability. About January 16, 1926, a certificate of overassessment was delivered to the partnership showing a net overassessment of $51,060.56 to have been abated. This disposed of the remaining balance of the additional tax of $126,060.55 which had been assessed during 1919.

On December 8, 1926, the Commissioner of Internal Revenue advised plaintiff of a deficiency of $31,137.75 for the calendar year of 1917 which was formally assessed. This deficiency letter and the assessment were timely under a waiver which plaintiff had filed.

On February 7, 1927, the plaintiff filed a timely appeal with the United States Board of Tax Appeals from the deficiency letter of December 8, 1926. No hearing was ever had on that appeal. On August 22, 1928, counsel for the respective parties filed a stipulation with the Board agreeing that a correct determination of plaintiff's tax liability for the year 1917 disclosed an overpayment in the amount of $3,814.27, and pursuant to the stipulation the Board entered an order from which no appeal was ever taken reading as follows:

> Ordered and decided: That, upon redetermination, there is an overpayment for 1917 of $3,814.27.

On November 12, 1928, the Commissioner signed a schedule of overassessments, including one in plaintiff's favor of $31,137.75 for the year 1917 and on November 28,

1928, there was delivered to plaintiff a certificate of overassessment reading in part as follows:

Overassessment	$34, 952. 02
Barred by statute of limitations	3, 814. 27
Overassessment allowable	31, 137. 75

The item of $31,137.75 was thereafter abated in full but the Commissioner declined to refund the item of $3,814.27 (which is the amount involved in this suit) upon the ground that it was barred by the provisions of section 507 of the revenue act of 1928, which will be hereinafter set out and the effect of its application to the facts in the case determined.

On October 7, 1932, the plaintiff filed with the collector of internal revenue for his district a claim for refund in the amount of $29,643.04, but any claim for recovery thereon is now abandoned by him. The case of plaintiff is now based on the allegation that plaintiff had filed a timely though informal claim for refund of the overpayment of $3,814.27 determined by the Board of Tax Appeals and this presents the main issue in the case.

As shown in Finding 6, in determining and reporting his taxable net income and the tax due thereon the plaintiff did not take as a credit against his net income his proportionate share of the partnership's excess profits tax. In his letter of May 13, 1921, to which reference has been made above, the attorney for the plaintiff acknowledged the receipt of the letter of the Commissioner dated March 11, 1921, and objected to the computation of the tax liability made by the Commissioner for several reasons. Plaintiff particularly relies upon a statement made in the letter which reads as follows:

(6) A change in the excess profits tax of the firm for 1917 affects the excess profits credit on the returns of the individual partners for that year. Would it be possible to have the credit due them, i. e., Mr. Joseph B. Morrell and Mr. Amos D. Carver, on their returns on this account taken care of at the same time?

Opinion of the Court

It is argued in behalf of plaintiff that the above statement quoted from the letter of the attorney for the plaintiff constituted an informal claim for a refund.

It will be observed that this statement does not ask for a refund and makes no claim that plaintiff is entitled to one, nor can we find in it any language which might be construed as making such a claim. It is merely an inquiry as to whether a certain thing could be done in making up the accounts of the individual parties. We do not consider it an informal claim which could afterwards be perfected. It is urged on behalf of the plaintiff that it was afterwards perfected by being allowed. It is true that after some long drawn out proceedings the matter of plaintiff's liability for taxes was submitted to the Board of Tax Appeals which found his taxes had been overpaid in the amount for which plaintiff now seeks judgment. If the plaintiff's attorney in the letter of May 13, 1921, had claimed that a recomputation of plaintiff's income tax on the lines suggested in the letter would show it was entitled to a refund, this might have furnished a base for arguing that an informal claim for refund was made in the letter, but no such statement was made. We find nothing in the cases cited by counsel for plaintiff which would sustain a holding that a mere suggestion of a change in the computation of the tax would constitute an informal claim for a refund.

After this letter was written the Commissioner recomputed the tax and held that a deficiency existed. From this determination the plaintiff appealed to the Board of Tax Appeals. Thereafter the Board held and entered an order pursuant to a stipulation on August 25, 1928, that plaintiff had overpaid its taxes for 1917 in the amount of $3,814.27. This decision of the Board of Tax Appeals was not appealed from and became final as to the amount of overpayment and we have frequently held that it may become the basis of a suit to recover the amount thereof, but the right of recovery in cases like the one we have before us is subject to certain statutory restrictions, the effect of which will be hereinafter determined.

Plaintiff contends that as his suit was brought within six years of the time when the Board of Tax Appeals entered

Opinion of the Court

its determination he is entitled to recover the $3,814.27 found by the Board to be overpaid. In *National Fire Ins. Co.* v. *United States*, 72 C. Cls. 663, 669, we held following the cases of *Ohio Steel Foundry Co.* v. *United States*, 69 C. Cls. 158, and *Arthur Curtiss James* v. *United States*, 69 C. Cls. 215, that where the Board of Tax Appeals determines an overpayment and no question of credits is involved, and the refund of the overpayment was not barred by the statute of limitations at the time of the decision of the board, suit might be brought within six years from the date of the board's decision. But section 284 (e) of the revenue act of 1926 (44 Stat. 9, 66), as amended by section 507 of the revenue act of 1928 (45 Stat. 791, 871), provides that when the board finds that the taxpayer has made an overpayment—

> Unless claim for credit or refund, or the petition, was filed within the time prescribed in subdivision (g) for filing claims, no such credit or refund shall be made of any portion of the tax paid more than four years (or, in the case of a tax imposed by this title, more than three years) before the filing of the claim or the filing of the petition, whichever is earlier.

The case of *National Fire Ins. Co.*, *supra*, like the one at bar, was a suit upon an overpayment determined by the Board of Tax Appeals and it was held therein that the jurisdiction of the board extends "only to the determination of the fact of overpayment and the amount thereof," that the right to sue for the overpayment in such cases depends upon section 284 (e) of the act of 1926 (44 Stat. 9, 66), as amended, being the provision heretofore set out, and that it is governed thereby "and not by the provision of section 156 of the Judicial Code (28 U. S. C. A. 262), as for suits upon claims against the United States." The court further held that in such cases "the right to recover is dependent upon whether a timely and sufficient claim for refund was filed" and, having found that no such claim had been filed within the time allowed by section 284 (g) of the revenue act of 1926, it was held that the plaintiff could not recover, and the petition was dismissed.

The rules laid down in the *National Fire Ins. Co. case*, *supra*, are applicable here.

Opinion of the Court

In the instant case we have held that the so-called informal claim was not in fact any claim for refund whatever. It follows that the provisions of section 284 (g)[1] of the revenue act of 1926 were not complied with and that plaintiff cannot recover upon the finding and determination of the Board of Tax Appeals.

The certificate of overassessment furnishes no better basis for plaintiff's suit than the determination of the Board of Tax Appeals. We have held in several cases that where the Commissioner issues a certificate of overpayment and in the certificate states erroneously that the overpayment is barred and by reason thereof a refund is refused, suit may nevertheless be maintained on the certificate as an account stated, the overpayment not being in fact barred. But here we have a different situation. The refund of the overpayment was barred for the same reason that an action upon the finding of the Board of Tax Appeals was barred, as shown above, and the conclusion of the Commissioner was correct. The certificate of overassessment was brought about by the determination of the Board of Tax Appeals and the statement of the amount of overpayment is merely a restatement of the finding of the board. Conceding *arguendo* that the certificate of overpayment constituted an account stated in favor of the plaintiff, it is nevertheless governed by statutory provisions. As was said in *Goodenough, Trustee, v. United States*, 85 C. Cls. 258, 299, an account stated gives rise to an implied promise to pay the indebtedness set forth, but "recovery on this implied promise may be barred by lapse of time" and it may also be barred by an express statutory provision, as it was by the same provisions that barred an action on the determination of the Board of Tax Appeals.

The plaintiff's petition must be dismissed and it is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* and BOOTH, *Chief Justice*, concur.

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[1] Subdivision (g) of section 284 of the revenue act of 1926 provided, among other things, with reference to such cases as we have before us, that the credit or refund "shall be allowed or made if claim therefor is filed either (1) within four years from the time the tax was paid, or (2) on or before April 1, 1926"; also that "This subdivision shall not authorize a credit or refund prohibited by the provisions of subdivision (d)."

Littleton, Judge, concurring

LITTLETON, concurring: I concur in all that is said in the foregoing opinion and desire only to point out, first, that the letter of May 13, 1921, written by the attorney-in-fact of the partnership and plaintiff clearly did not have reference to the second or double deduction of the profits tax due by the partnership, as a separate taxable entity, from the plaintiff's distributable share of the net income of the partnership remaining after the deduction from the total net taxable income of the partnership of the total profits tax due by such partnership; and, second, that even if the inquiry of plaintiff's attorney on May 13, 1921, could be regarded as a claim for refund, informal or otherwise, the provisions of the Revenue Act of 1917, which levied an excess profits tax on the net income of the partnership, did not authorize a double deduction of the excess profits tax due by the partnership, first, from the total net income of the partnership in determining the distributable share of the partners; and, second, another deduction of such profits tax by the partners when returning as their income such distributable share of the partnership net income remaining after the first deduction of such profits tax.

At the time the letter of May 13, 1921, finding 4, was written, it was the established and uniform practice of the Bureau of Internal Revenue to determine the total net taxable income of the partnership and in accordance with the provisions of the Revenue Act of 1917 to compute thereon an excess profits tax which was payable by the partnership. After such profits tax had been determined, the amount thereof was deducted from the total net income of the partnership, which, except for such profits tax, would be distributable and taxable to the partners. After the profits tax had thus been deducted from the total net income of the partnership, the balance was treated as the amount distributable and taxable to the partners in the proportion of their interests in the partnership. A second deduction of the profits tax due by the partnership was not under the regulations and decisions then in force allowed to the partners from their distributable income of the partnership as so determined. The letter of May 13, 1921, obviously had reference onlv to the one deduction of the profits tax which

was then being consistently allowed in determining the amount of the distributable income of the partnership taxable to the partners. Its language clearly so shows for the reason that it was simply an inquiry of the Commissioner whether the distributable share of the partners could be determined at the same time the final determination was made in respect of the taxable net income and excess profits tax of the partnership, inasmuch as a change in the excess profits tax of the partnership which was deductible from the total net income of the partnership in determining the remainder distributable and taxable to the partners would affect the amount so distributable and taxable to the partners. It was not until more than five years later, on November 3, 1926, that the case of *Reid* v. *Rafferty*, 15 Fed. (2d) 264, was decided in which it was held, and I think erroneously, that notwithstanding the excess profits tax imposed upon and due by the partnership upon its total net taxable income had been deducted from such total net income in determining the distributable share taxable to the partners, the partners were again entitled in reporting such distributable share for income tax purposes to again deduct from such distributable shares the total excess profits tax due by the partnership. The overpayment here sought to be recovered results from such second deduction which was clearly a different ground than that to which the letter of May 13, 1921, had referred. It is obvious that if the attorney of the partnership and plaintiff had been referring to the second deduction, which had up to that time never been allowed, he would have stated his position with reference thereto in language sufficiently clear not to be misunderstood. It is clear, therefore, that even if the letter could be treated as an informal claim for refund, it did not specify the ground or facts upon which this suit is based.

I am of opinion that the Revenue Act of 1917 (40 Stat. 300) authorized and allowed only one deduction of the excess-profits tax of the partnership in determining the distributable income of the partnership taxable to the partners and that, for that reason, plaintiff has underpaid rather than overpaid his taxes. In the case at bar the total net taxable income of the partnership was $544,488.87, and the excess

Syllabus

profits tax due and paid by the partnership was $161,005.37. After the deduction of this profits tax from the net income of the partnership distributable and taxable to the partners, the amount so distributable and taxable was $383,483.50 (finding 5). The overpayment here sought to be recovered is based upon a deduction the second time of excess-profits tax of $161,005.37 from the distributable net income of the partnership of $383,483.50, remaining after the first deduction of such profits tax. The overpayment here sought to be recovered is therefore based upon a deduction by the partners of twice the amount of profits tax of the partnership, or $322,010.74 instead of $161,005.37. In other words, under plaintiff's contention each partner gets a deduction of the entire profits tax of the partnership from his distributable share of the partnership's net income rather than his proportion of the profits tax of the partnership.

MEMORANDUM ON MOTION FOR NEW TRIAL

PER CURIAM:

The motion for new trial must be overruled, not only for the reasons stated in the opinion of the Court, but also those stated in the concurring opinion of Judge Littleton, with which the Court agrees.

SQUAW ISLAND FREIGHT TERMINAL CO. v. THE UNITED STATES

[No. 43177. Decided May 29, 1939; Plaintiff's motion and defendant's motion for new trial overruled October 2, 1939]

On the Proofs

Compensation for loss of property and damages.—Under the jurisdictional Act of August 26, 1935, it is held that it was the duty of the Government to maintain a proper and adequate dike to protect plaintiff's gravel island from damages by the waters of the Black Rock Canal.

Same; interest as "just compensation."—It is held that plaintiff cannot recover interest "as a part of just compensation"; there was no taking of plaintiff's property for a public use within the meaning of the Fifth Amendment.

The Reporter's statement of the case:

Mr. S. Wallace Dempsey for the plaintiff. *Mr. Bruce Fuller* was on the brief.

Mr. George F. Foley, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant. *Mr. Paris Houston* was on the brief.

Plaintiff sues to recover $110,278.88 with interest from January 5, 1922, until paid, for the alleged value of 210,000 cubic yards of gravel alleged to have been lost by being washed away from Squaw Island, owned by it, near Buffalo, New York, by reason of defendant's negligence in failing to construct and maintain an adequate and proper dike along the easterly shore of the Island so as to protect it from the waters of Black Rock Harbor and Canal, a part of the old Erie Canal.

This suit was brought under a special act of Congress waiving the statute of limitation and all other limitations upon the jurisdiction of the court.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff is a New York corporation and is and was, at all times herein material, the owner in fee of Squaw Island, containing about 150 acres, separated by the Black Rock Harbor and channel, a portion of the old Erie Canal, from the main part of the city of Buffalo. The island lies between the Niagara River on the west and the harbor and canal on the east. The dike of earth, hereinafter referred to and described, as originally constructed was only three feet above the normal low-water surface of the canal. The water level of the canal was 4½ feet higher than the level of the Niagara River.

2. The Committees on Claims of the Senate and House of Representatives[1] in their reports on the jurisdictional

[1] House Report No. 948, 74th Cong., 1st sess.

bill, under which this suit was brought, made findings of fact upon which the bill was enacted, which findings, so far as sustained by the record here, are as follows:

Squaw Island is a small island, containing about 150 acres, separated by the Black Rock Harbor portion of the old Erie Canal from the main part of the city of Buffalo. It is formed of the best sort of gravel for construction purposes, and on account of its proximity to the city of Buffalo with its 573,000 people it is highly valuable, there being practically no transportation costs, and the gravel being transferred from the island direct to the various yards, within a 30-minute trucking distance of the island, and thence supplied to the various construction projects where the gravel was used.

The Erie Canal was a State of New York project constructed in 1825, and it remained such until 1905. A project for a channel 21 feet deep from the Buffalo Harbor to North Tonawanda was adopted by the United States in 1905. Under State control, it had a depth past the island of about 12 feet. When the Government took over control, it deepened the harbor and canal past the island to 22 feet.

When that project was adopted, the Black Rock Harbor was 200 feet to 700 feet wide, and would accommodate vessels of 8-foot draft. The United States Project width through the Black Rock Channel was generally 200 feet wide, but 240 feet at the curve, and widened to 300 feet immediately south of the International Bridge. It provided for a ship lock at Bridge Street.

From the ship lock the project continues with a channel 400 feet wide to the end of Rattlesnake Island. (Part I, Chief of Engineers Report for 1930, pp. 1668, 1669.)

When the channel was deepened by the island to 22 feet, it was simply excavated, and no bank protection on the island side was constructed or provided, but the bank was left as it was deepened from 8 feet to 22 feet in its natural condition.

There was an embankment to the height of from 8 to 10 feet above the surface of the island along the west side of the channel, and this embankment was not strengthened in any way when the channel was deepened.

There is a sharp drop all the way from Buffalo Harbor down to Niagara Falls, and there is a drop from

Buffalo Harbor down to the lock at Squaw Island. All of the enormous volume of water of the Great Lakes finds its way from Lake Superior and Lake Michigan eastwardly and northerly to Buffalo, and then through the narrow channel of the Niagara River to Lake Ontario, with a fall altogether in the 35 miles from Lake Erie to Lake Ontario of 330 feet. This tremendous fall generates an exceedingly strong and fast current in ordinary times, which is accelerated in volume and strength so that it becomes a torrent in times of storms and all through the winter season.

In December 1921 and January 1922 there were several severe storms. While, as has been said, there was this artificial bank 8 to 10 feet high, stretching from the lock to the south end of the island, the bank was in no way changed or strengthened for far the greater part of the distance or for any part of it except south from the lock to a point a short distance south of the International Bridge, a distance of about 300 feet, leaving over one-half mile of the bank just as it was when there was only the 8-foot depth in the channel.

The first storm occurred the 18th of December, as a result of which there were small breaks in the dike. There was an interval of 2 weeks before the next storm, which occurred the 31st of December, ample time to have repaired the first breaks. No repairs, however, were made. The second storm made what had been inconsequential and harmless breaks large and destructive. With nothing done still the third storm occurred January 5. Although the bank was insufficient for the strain to which it was sure to be subjected, none the less the second storm would have been comparatively harmless had the breaks caused by the first been promptly repaired. Nothing was done, however, until the 6th of January, when the repair of the breaches was commenced and completed the 25th of February.

A table showing the high- and low-water levels at Buffalo from 1912 to 1922 shows that the storms which caused the damage were by no means unusual, and that the maximum stages of water during these storms were about what it had been all through this long period of years. * * *

The Government contends that the storms were of unusual severity and that, therefore, it is not responsible. It is a well-known engineering fact that the pressure from water depends upon the volume and its current,

and that its pressure increases directly in proportion as the volume and the current increases. This being so, it was, of course, an obvious engineering necessity that when the channel was deepened from 8 to 22 feet the bank should have been strengthened proportionately, but, when the breaks occurred, no strengthening whatever had been provided. In other words, the bank which had been prepared to protect an island against an 8-foot channel only was not strengthened when that channel was deepened to 22 feet, and the pressure was certain to be practically three times as great. This neglect was not the act of Providence but was that of the Government engaged in an engineering project for which it is assumed to have competent, expert advice, and in which it was bound to provide the obviously necessary safeguards.

The breaks caused by the first storm were trifling and insignificant in themselves, but they provided small channels through which the water would begin to flow the instant it was raised through a second storm, and as is quite obvious they would be increased and widened through every moment of the continuance of the later storms.

That the Government could have made the repairs in the time it had is quite obviously a fact. They started the repairs the 6th of January, and, with no reason for haste, because all the damage had been done, they completed them on the 25th of February. With the preventing of damages as an incentive, and with an extra number of men and the necessary equipment, at least temporary, if not permanent, repairs could have been made in the 2 weeks which intervened and all of the * * * damage caused to this claimant would have been saved.

There can be no excuse for the utter neglect of the Government to do anything to save claimant's property when it was plain and obvious that great damage would result from any second and still more a third storm.

* * * The damage was caused by the storms of December 31 and January 5 and not by that of December 18.

By examining the tables prepared by the United States Lake Survey office at Detroit it will be seen that the maximum stage of the water on December 31 was 576.66, and on January 5 was 575.80; while the stage was somewhat greater December 18, only slight breaks were

caused through it, and these breaks could have been easily repaired. The maximum stage which was reached December 31 was, it will be seen on examining the tables, exceeded repeatedly in 1913, 1914, 1916, 1917, 1918, 1919, and 1920. It is quite clear that the stage of water which was reached on the dates of the two storms which caused the damage here and even higher stages were to be anticipated, and it follows that the real cause of the disaster was the failure to strengthen the embankment in 1905, and the failure after the slight and harmless breaks made on December 18 to make the temporary if not permanent repairs before the next storm on December 31, in view of the undisputed and indisputable facts, the claim of the Government that this disaster was the act of God is without foundation or basis.

The bank was thrown up when the canal was originally constructed previous to 1825. Up to 1905, when the canal was deepened and the pressure tripled, the bank may have been sufficient. From 1905 to 1921, with this triple pressure, and with storms of practically the same severity from 1912 to 1921 and 1922 which caused the damage here, the bank was gradually eaten and worn into and undermined and weakened, of all of which the Government was bound to take notice, and, while it was insufficient when the deepening was completed, it was made even more so by the pressure through this period of years, and the combination was the breaking through and the damage. * * *

The argument that the bank was strong enough because it stood the pressure against it for a certain time is wholly untenable, and is equivalent to saying that any object insufficient for the use to which it was put, and weakened through long use, was adequate because it for a time stood a strain to which it was unequal. * * *

3. Authority to repair the December 18, 1921, break in the dike was not obtained by local Federal officials of the District Engineers' Office until January 1922. A district engineer and assistants of the War Department were stationed at Buffalo in 1921 and 1922.

The normal current of the Niagara River outside the harbor is four to five miles an hour. There were three breaks in the dike, designated breaks nos. 1, 2, and 3. No. 2 was the principal break which caused the damage. During

the storm of December 18, 1921, break no. 2 was started and was washed out to a width of about 50 feet and water to a depth of about one foot flowed through during this storm. This caused no damage to the island. Very little water flowed over the top of break no. 2 by this storm, and the storm of December 31. The storm of December 31 deepened break no. 2 to a depth of 2 feet and a width of 80 feet. Only slight damage to the gravel on the island occurred as a result of this storm. The principal increase in the break and the main damage were caused by the storm of January 5, 1922, which increased the depth of the break from 2 feet below mean lake level to about 25 feet and to a width of 275 feet. The storm of January 5 produced on that date, and until repairs were made, a current of 13 miles an hour over plaintiff's property by reason of the washing out of the dike, and because of the difference of 4½ feet in elevation of the canal above the river. During and after the January 5 storm, the velocity of the water flowing through the break in the dike was such as to move stones weighing as much as 5 tons. The dike was repaired with stone and its depth was increased 8 feet and its width increased 6 feet at the top.

4. When the special act under which this suit was instituted was being considered by Congress, the War Department in written objections filed with the claims committees opposed its enactment on the grounds that after the canal was taken over by the United States the dike which broke and caused the damage herein claimed was strengthened and improved; that in December 1921 and January 1922 severe storms caused the highest water at Buffalo that had been experienced since 1900; that when breaks occurred in the earthen dike protecting plaintiff's island of gravel from Black Rock Harbor and Canal immediate steps were taken to close the breaks and strengthen the dike, but before any repairs could be made the breaks were widened and deepened by subsequent storms, and that the United States exercised all the diligence which experience showed to be necessary and it was not responsible for the results of the unusual weather conditions which, in the light of past experience, were not to be anticipated. These grounds of

justification for failure of the defendant to repair and strengthen the dike after the first break on December 18, 1921, are not sustained by the evidence.

5. For many years prior to December 18, 1922, and at all times subsequent thereto, plaintiff has been engaged in the business of excavating and selling gravel. It obtained this gravel from below water along the edge of Squaw Island. Squaw Island was under mortgage, and the mortgagees were due certain repayments if and when the acreage of the island was reduced. Dry-land operations were therefore not used in the recovery of gravel, and plaintiff confined its operations to sucking up gravel from below water.

The water from the canal which flowed through the break in the dike eroded some of the upland and swept the gravel therein out into Niagara River. The gravel so displaced was washed out beyond plaintiff's harbor line, which marked the limit of the subaqueous area wherein plaintiff held grants from the State of New York, and from which it was recovering its gravel. Plaintiff, after the storms referred to, continued the dredging of gravel as theretofore, and did not cease such operations due to lack of available gravel. Such operations did cease in 1927, due to the fouling of gravel by sewage from the City of Buffalo, making the gravel unsalable. The fair market value of the gravel, when recovered from under water along the shores of the island and ready for delivery, at the time when the erosion occurred, was 50 cents per cubic yard.

Beginning sometime in 1923, dredging of gravel by the plaintiff was done under permits issued by the Federal Government. Theretofore Federal permits had not been required.

6. For the purpose of estimating the acreage of the upland washed away by the storm of January 5, 1922, by reason of the break in the dike, a survey in 1917 was compared with a survey made in May 1922. A comparison of these surveys indicated a loss of some 7 acres of upland, composed of 210,000 cubic yards.

Between 1917 and May 1922 plaintiff had been recovering gravel along the shore line so that the contours and shore

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line of 1917 were not the same as immediately before the storms of 1921 and 1922. At the same time that gravel was being removed by the plaintiff, gravel was being placed and displaced by natural processes.

Taking into consideration the necessarily inconclusive nature of the proof as to the actual amount of upland gravel washed away beyond recovery under subaqueous grants from the State of New York, and the conclusive proof that a substantial amount of gravel was in fact washed away, as a result of defendant's delay and failure to repair the break in the dike, the amount thereof, within the bounds of reasonable certainty, is found to be 150,000 cubic yards, the value of which at the time this gravel was lost to plaintiff by being washed away beyond recovery was 50 cents per cubic yard—finding 5. Plaintiff's loss was and is $75,000.

The court decided that the plaintiff was entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The Jurisdictional Act of August 26, 1935,[2] waives the defense that the action is one sounding in tort. Plaintiff's actual loss, which we have found to be $75,000, resulted from the breaking of the dike of earth which afforded the only protection of plaintiff's property from the waters of the Black Rock Harbor and Canal which dike the facts show the defendant negligently failed to repair promptly after the first harmless break therein on December 18, 1921. It was the duty of the defendant to maintain a proper and adequate

[2] "Conferring jurisdiction upon the Court of Claims to hear, consider, and render judgment on the claim of Squaw Island Freight Terminal Company, Incorporated, of Buffalo, New York, against the United States in respect of loss of property occasioned by the breaking of a Government dike on Squaw Island.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That jurisdiction is hereby conferred upon the Court of Claims of the United States, notwithstanding the lapse of time or any statute of limitations or other limitations upon the jurisdiction of such court, to hear, consider, and render judgment on the claim of Squaw Island Freight Terminal Company, Incorporated, for just compensation to it for loss of property and/or damages occasioned by the breaking of an inadequate and/or improperly and insufficiently constructed Government dike on Squaw Island between Black Rock Canal and the Niagara River in December 1921 and January 1922." (49 Stat. 2177.)

dike to protect plaintiff's gravel island from damage by the waters of the canal and the facts show that by the exercise of reasonable diligence the break in the dike on December 18, 1921, which did not cause any of the damage herein found to have been sustained by plaintiff, could have been repaired and the dike made adequate and sufficient to prevent the loss which occurred as a result of a storm causing similar high waters January 5, 1922. The work of repairing the dike after all the damage herein found had been sustained by plaintiff was begun on January 6, 1922, and the dike was reconstructed of stone. The work was completed on February 25, 1922. In these circumstances it seems clear that under the provisions of the jurisdictional act the plaintiff is entitled to recover the amount of its actual damages.

Plaintiff also claims interest at 6 percent from January 5, 1922, "as a part of just compensation," but it is clear that it cannot recover interest on the damages sustained by reason of the failure of the defendant to maintain an adequate and properly constructed dike to protect plaintiff's property from damage or to exercise reasonable diligence in repairing the same after the break on December 18, 1921, and before the damage sustained by plaintiff occurred. There was no taking of plaintiff's property by the defendant for a public use within the meaning of the Fifth Amendment.

Judgment will be entered in favor of plaintiff for $75,000 without interest. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

[Plaintiff's motion to amend the judgment, so as to include interest, overruled June 26, 1939.]

CHEROKEE FUEL COMPANY v. THE UNITED STATES

[No. 43289. Decided May 29, 1939; Plaintiff's motion for new trial overruled October 2, 1939]

On the Proofs

Government contract; cancellation.—Where contract between plaintiff and the Government, represented by the Quartermaster Corps, U. S. A., called for delivery of coal within a stated period in accordance with schedule of delivery calls to be furnished to plaintiff and where contract also provided that at expiration of period any undelivered coal not covered by schedule of delivery calls would be automatically cancelled, it is held that this provision had no reference to the termination of the contract under Section 2, which provided that the contract might be terminated at any time by the Quartermaster General, upon notice, in the public interest.

Same; schedule of delivery calls.—The entry by the supply officer on printed forms of "Schedule of Delivery" calls of the total tonnage of coal specified in the contract was not a "Schedule of Delivery" call for the entire amount of coal.

Same.—The schedule of delivery of the coal, as specified by the supply officer, was the important and controlling feature of the contract.

Same.—It is held that the facts show that the Government accepted and paid for all coal for which the supply officer furnished the plaintiff with schedules of delivery.

Same; termination of contract.—It is held that the evidence shows that the Quartermaster General terminated the contract under and in accordance with the provisions of section 2 thereof. *Sinclair Coal Co.* v. *U. S.*, 65 C. Cls. 704, and *Midland Coal Co.* v. *U. S.*, 65 C. Cls. 717, distinguished.

Same; advances made to another.—It is held that no recovery can be had on account of advances made by plaintiff to another.

The Reporter's statement of the case:

Mr. M. Walton Hendry for the plaintiff.

Mr. Carl Eardley, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant.

Plaintiff seeks to recover $43,433.29 for alleged breach of contract for 30,000 tons of coal.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff is a Missouri corporation with its principal place of business at Kansas City. A special act of Congress approved January 24, 1936, waives the defense of the statute of limitation.

2. May 8, 1920, plaintiff submitted its written proposal to the Director of Purchase, Regular Supplies Division, United States Army, in which it proposed to furnish to defendant, for delivery at Camp Funston, Kansas, 10,000 tons run-of-mine over 6″ screen coal at the price of $3.90 per ton, f. o. b. cars at Youngstown, Missouri; also 20,000 tons of nut through 2½″ screen coal at the price of $2.65 per ton, f. o. b. Youngstown, Missouri. Said proposal, under the heading of "Remarks" contains the following: "This proposition is made with the distinct understanding that the above percentage of each grade is to be shipped at the same time and fairly distributed during the year."

3. On July 13, 1920, plaintiff received from defendant's Quartermaster General a telegram as follows:

> ON BIDS OPENED IN THIS OFFICE MAY FOURTEENTH YOU HAVE BEEN AWARDED TEN THOUSAND TONS BITUMINOUS SIX INCH LUMP AND TWENTY THOUSAND TONS TWO AND ONE HALF INCH SCREENINGS FOB MINES PERIOD THIS CANCELS TELEGRAM FROM THIS OFFICE JUNE FOURTEENTH REGARDING AWARDS J EIGHT NAUGHT ONE RM

4. The contract was dated July 1, 1920. On August 4, 1920, it was forwarded to plaintiff for its signature. Plaintiff signed the contract on August 15, 1920. The contract is of record as plaintiff's exhibit 3, and is, by reference, made a part of this finding.

According to the terms of said contract, plaintiff agreed to deliver to defendant 30,000 tons of coal as follows: 10,000 tons of run-of-mine over 6″ screen coal at $3.90 per ton; and 20,000 tons of nut through 2½″ screen coal at $2.65 per ton, for a total consideration of $92,000 for said 30,000 tons, f. o. b. mines, Youngstown, Missouri.

Paragraph 2 of the contract provided that—

> The contractor shall furnish and deliver to the United States, and the United States shall accept and pay for, the articles or work described, and upon the terms and conditions set forth, in Schedule A, attached hereto and by reference made a part hereof.

Schedule A was a printed form which was a portion of a standard contract, which Schedule was to be filled in describing the character and quantity of articles covered by the contract, the unit price, and the total contract price thereof, and other appropriate references, and, so far as material here, provided, as filled in, as follows:

> SCHEDULE OF DEL.: As called for by Supply Officer, Camp Funston, Kansas, prior to June 30, 1921.
>
> * * * * *
>
> GENERAL: At expiration of contract any undelivered material not covered by calls will be automatically cancelled.

The documents furnished supply officers and used by them in issuing schedule of delivery calls for materials under Q. M. C. Form 108C, which was the standard form of contract entered into between plaintiff and the defendant, were the standard schedule of delivery printed form, Q. M. C. Form 108G, to be filled in by such supply officer. A copy of the first schedule of delivery call issued under plaintiff's contract, which call was delivered by the supply officer to the Depot Quartermaster at St. Louis, Mo., and by such Quartermaster transmitted to plaintiff, was as follows: (The italicized portion represents the statements written upon the printed form by the supply officer at Camp Funston, Kansas.)

CALL ON CONTRACTOR

Q. M. C. Form 108–G
Authorized July 20, 1918.

Under Contract No. dated *July 12, 1920.*
Authorization No. *QMPJ 212001 PM 2007*
From *Camp Supply Officer, Camp Funston, Kansas.*
To:
Name *Cherokee Fuel Co.*
Address *Kansas City, Mo.*
Factory Location

Reporter's Statement of the Case

Ship to: *Camp Supply Officer, Camp Funston, Kansas.*
Articles *Coal, Bituminous, nut through 2½" screen.*
Quantity *20,000 tons.*
Unit Price *$2.55*
Total Price
Delivery point and Schedule *Camp Funston, Kansas, shipments to begin at once at rate of five cars per week until further notice.*

Notify Depot Officer, St. Louis when supplies will be ready for inspection and shipment.

(Signed) WM. H. TOBIN,
Major, Q. M. C.,
Quartermaster.

5. July 16, 1920, the Depot Quartermaster at St. Louis, Missouri, transmitted the above-quoted "Schedule of Delivery" Call to plaintiff with the following letter:

> Enclosed herewith CALL issued by the Camp Quartermaster, Camp Funston, Ks., on your company Authorization QMPJ 212001 PM 2007 for 20,000 tons Coal, Bituminous, nut through 2½" screen, to be delivered at the rate of five cars per week until further notice, shipments to begin at once.
> It is requested that prompt measures be taken by you with a view of supplying coal as called for.

6. July 20, 1920, plaintiff wrote Quartermaster Corps, as follows:

> Referring to your file #400.15 Reg. S–RM–F, we note that you have accepted our proposal dated May 8th for 20,000 tons of 2½" screenings and 10,000 tons 6" lump coal for shipment to Camp Funston during the coming year, delivery to be arranged by Depot Supplying Officer, St. Louis.
> We already have an order from the Depot Supply Officer at St. Louis for five cars of the 2½" screenings per week, but have no order for lump. We have asked him to change this order to two cars of lump and four cars of the screenings, per week, which will be about the proportion in which the coal is loaded, and on receipt of his authority to change this order, or amend same, we will place same with the mines for attention.

7. On August 4, 1920, the supply officer at Camp Funston prepared a schedule of delivery call in the manner above quoted for run-of-mine coal over 6" bar screen for which

grade the contract specified a total of 10,000 tons and opposite the printed heading "Quantity" the supply officer entered "10,000 tons." And opposite the heading "Delivery point and Schedule" he entered the following: "Camp Funston, Kansas. Shipments to begin September 1st, 1920, at rate of ten cars per week until further notice."

August 6, 1920, the Depot Quartermaster, at St. Louis, wrote shipping instructions to plaintiff as follows:

> Enclosed herewith call issued by Camp Funston for 10,000 tons Coal, Bituminous, ROM, over 6″ bar screen, Contract 2635, shipments to begin September 1, 1920, at the rate of ten cars per week until further notice.
> It is requested that you make shipment in accordance with this call.

8. August 19, 1920, the supply officer at Camp Funston issued another printed form call for run-of-mine coal of 6″ bar screen in the same manner above mentioned, except under "Delivery point and Schedule" the supply officer wrote "Camp Funston, Kansas. Shipment to begin Sept. 1st, 1920, at rate of five cars per week until further notice." In filling in this printed form, the supply officer, as before, under the heading "Quantity," entered "10,000 tons." At the same time he issued a like call for run-of-mine coal 2½″ screen and under "Delivery point and Schedule" called for shipment at the rate of ten cars per week until further notice, and under the heading "Quantity" in this call he entered "20,000 tons," which was the total amount of this grade of coal specified in the contract. The "Schedule of Delivery" calls were transmitted by the Depot Quartermaster at St. Louis to plaintiff with shipping instructions in a letter of August 23, 1920, as follows:

> Enclosed herewith are copies of Calls issued by the Camp Quartermaster, Camp Funston, Kansas, for 10,000 tons Coal, Bituminous, run of mine, over 6″ bar screen, and 20,000 tons Coal, Bituminous, run of mine, through 2½″ screen, the coal over 6″ bar screen to be delivered at the rate of five cars per week and that through 2½″ screen at the rate of ten cars per week, until further notice.
> These Calls modify Calls previously made on this Contract.

October 2, 1920, the supply officer issued schedule of delivery Call No. 2 for nut coal through 2½″ screen and entered under the printed heading "Quantity" "20,000 tons" and under the printed heading "Delivery point and Schedule" the following: "Camp Funston, Kansas. Shipment to begin at once at rate of ten cars per week for the month of October. Beginning with November 1st this should be increased to fifteen cars per week for the balance of the shipment."

Thereafter, beginning November 11, 1920, the schedule of delivery calls were issued on a monthly basis for the delivery of coal at the rate of a certain number of cars per day. In Call No. 3 issued on that date for run-of-mine coal over 6″ bar screen, the supply officer entered under the printed heading "Quantity" "4,000 tons" and under "Delivery point of Schedule" the following:

> Camp Funston, Kansas. *To be delivered during month of Dec. 1920.* Shipment to be regulated, beginning December 1, 1920, at the rate of *3 cars (150 tons) per day.*
>
> REMARKS: Beginning with Dec. 1st, this Call #3, takes the place of Call #1 for Lump Coal, dated August 19, 1920. Coal received up to Nov. 30th will be applied on that call and vouchered accordingly. Coal received after Dec. 1st, will be applied on this Call.
>
> Call for delivery during January will be made by this office on Dec. 1st. Coal delivery for this camp has been placed on a daily schedule and monthly call. You are earnestly requested to regulate your shipments so as to meet the requirements of this office.

In Call No. 4 issued November 11, 1920, for nut coal through 2½″ screen, the supply officer entered under the printed heading "Quantity" "8,000 tons" and under the printed heading "Delivery point and Schedule" he entered the following:

> Camp Funston, Kansas. *Delivery during month of Dec. 1920.* Shipment to be regulated, beginning Dec. 1st, 1920, at the rate of *7 cars (300 tons) per day.*
>
> REMARKS: Beginning with Dec. 1st, this Call #4, takes the place of Call #2, for Nut Coal, dated October 2, 1920. Coal received up to Nov. 30th will be

> applied on that call and vouchered accordingly. Coal received after Dec. 1st will be applied on this Call.
>
> Call for delivery during January will be made by this office on Dec. 1st. Coal delivery for this Camp has been placed on a daily schedule and monthly call. You are earnestly requested to regulate your shipments so as to meet the requirements of this office.

These schedule-of-delivery calls were sent to plaintiff with a letter from the supply officer at Camp Funston, dated November 12, 1920, as follows:

> Herewith are calls Nos. 3 and 4 for coal deliveries required under your contract No. 2635, dated July 12th, 1920, to be delivered at this station during the month of December 1920, at the rate of seven (7) cars of nut and three (3) cars of lump per day.
>
> These two calls replace the calls made by this office August 19th, 1920, and October 2, 1920. Up to date deliveries under those calls have not been satisfactorily regulated to meet our needs, and by placing coal deliveries on a daily basis, as called for herein, it is hoped that our fuel problem will be solved.
>
> You are requested to give this matter your immediate attention and so regulate your shipments during the month of December that daily deliveries will arrive as required by the within calls.
>
> In this connection your attention is invited that coal delivered by you must come up to contract specifications and with your close inspection there should be no cause for rejections.
>
> You are also advised that a similar call in practically the same quantity will be placed with you about December 1st for delivery during January 1921, and on January 1st, 1921, call will be placed with you for delivery of the remainder of the contract during the early part of February.

9. December 3, 1920, the supply officer at Camp Funston issued a schedule of delivery Call No. 9 to plaintiff for the delivery of 6″ screen coal during the month of January 1921 at the rate of one car per day. Also, on the same date, he issued a schedule of delivery Call No. 10 for 2½″ screen coal to be delivered during January 1921 at the rate of two cars per day.

10. December 21, 1920, the Depot Quartermaster at St. Louis, Missouri, wrote plaintiff as follows:

> On account of the transfer of the 7th Division from Camp Funston, Kansas, which means the practical abandonment of the Camp, supplies intended for that station will not be required in the very near future in view of which steps are being taken by this office to cancel, wherever possible, all running contracts and purchase orders.
>
> 2. Reference same Quartermaster, Camp Funston, Kansas, has requested that upon completion of deliveries as called for on calls 9 and 10 for January period on your Contract 2635, no further deliveries on Contract be made.
>
> 3. It is requested that you make arrangements accordingly advising this office in the premises at the earliest possible date.

This letter was written by the Depot Quartermaster at St. Louis pursuant to instructions sent out to all officers concerned in the purchase and shipment of supplies and materials to Camp Funston by the Purchasing Division of the Quartermaster's Office at Washington, of which office Col. James P. Barney was chief and Capt. Hal T. Vigor the procuring, purchasing, and contracting officer and the successor of Capt. J. A. Lester, who was contracting officer at the time plaintiff's contract was made. The letter of December 21 was written by the Depot Quartermaster at St. Louis as the agent of the contracting officer.

December 29, 1920, the plaintiff, in response to the letter of December 21, 1920, wrote the Depot Quartermaster, as follows:

> Answering yours of the 21st, subject Contract 2635 coal for Camp Funston, Kansas, your file 463.3 Desk 7: We can hardly believe that on account of transfer of the 7th Division, from Camp Funston, meaning as you state, practical abandonment of the same, that you intend to cut off our contract on supply of coal.
>
> As a matter of fact, we made our proposition covering a period of 12 months, shipments to be fairly distributed, as our original bid will show, and named a low price for the specific purpose of securing business

during the spring and early summer months when demand for coal is usually light, therefore we could not consider cancellation of our contract at close of January as you suggest.

The fact is that we are supplying this coal from one small mine at Youngstown, Missouri, where the margin of profit to the operator depends on the ability of the mine to continue in steady operation during the year and this is why we made this special price on regular movement for twelve months. We have not been able to give the operator the benefit of open-market prices during the past few months when coal would have sold at a much higher price, consistent with regular market conditions. Therefore it will practically put this small operator out of business if we should have to surrender our contract at the close of January.

We are writing you thus fully regarding this matter so that you may understand our situation, as we cannot believe that you would want to work a hardship on the small operator as described above. Doubtless you could use the balance of this tonnage during the year at Fort Riley, an adjoining camp to Funston, and if so, we will have no objections to transferring the balance of the tonnage after January to Ft. Riley, or to any other Camp you may designate, but we do feel that our contract must be carried out.

I will appreciate it if you will take such action as is necessary to bring this matter to the attention of proper officials at Washington for a ruling.

11. January 4, 1921, Major Taylor, Quartermaster Corps, Depot Headquarters, St. Louis, Missouri, wrote plaintiff as follows:

Replying to your letter of Dec. 29, 1920, regarding Contract #2635, Bituminous Coal, Camp Funston, Kansas, apparently you have misinterpreted this office letter of December twenty-first.

This office has no authority to cancel Contract #2635; and this letter of December 21st was merely for the purpose of obtaining your opinion in the matter with a view of transmittal to Washington for instructions.

Washington has been informed December 31, 1920, in accordance with your reply and as soon as instructions from that office are at hand you will be advised.

Defendant issued no further calls subsequent to calls Nos. 9 and 10 for delivery of coal during the month of January. Plaintiff, by its letters of December 29, 1920, January 18, 1921, and others, protested the suspension of deliveries, stated it was ready, able, and willing at all times to complete deliveries under said contract, and requested diversion of the coal to other points. This the defendant was unable to do.

Plaintiff delivered coal pursuant to Calls 9 and 10. The balance of the coal necessary to complete the contract was unmined.

12. On January 29, 1921, plaintiff wrote the Secretary of War, as follows:

> We have just wired you as follows: "CAMP FUNSTON HAS CANCELLED ORDER FOR COAL ON OUR CONTRACT TWENTY-SIX THIRTY-FIVE ACCOUNT. CAMP BEING REMOVED WE HAVE SUPPLIED COAL REGULARLY ON THIS CONTRACT AND HAVE NO OTHER BUSINESS WHERE COAL CAN NOW BE ABSORBED. WILL THANK YOU TO GIVE IMMEDIATE INSTRUCTIONS WHERE WE SHALL SHIP THE CAR OF LUMP AND TWO CARS NUT RUN DAILY APPLYING ON THIS CONTRACT."
>
> You will find by referring to our contract #2635, covering supply of coal for Camp Funston, in making our bid, which is part of the contract, we specifically stated that the coal should be fairly distributed during the year. We supplied this coal during the season when demand far exceeded production of coal and when general market price was much higher than this contract price. This contract was made for the specific purpose of keeping a certain mine in operation regularly during the year and regardless of the fact that Camp Funston has been moved elsewhere, we must ask you to give us instructions as to where we shall ship the car of lump and two cars of nut run per day until termination of contract.
>
> An immediate reply will oblige.

February 5, 1921, the Chief of the Purchasing Division, Quartermaster Corps, replied as follows:

> 1. With reference to your letter of January 29, 1921, addressed to the Secretary of War, I have the honor to advise you that instructions have been issued to the Depot Quartermaster, Chicago, Ill., to cancel your contract.

2. This cancellation is made due to the abandonment of Camp Funston.

3. The Depot Quartermaster in Chicago was requested, by wire, if he could, to divert this coal to any other camp, post, or station within his area of distribution, to which he replied in the negative.

4. Any claim for damages which you may have incurred by reason of the cancellation of which contract should be made by you through the Depot Quartermaster, Chicago, Ill., for submission to the Auditor of the War Department for adjustment.

By authority of the Quartermaster General.

13. Section 2 of the contract provides:

Termination in public interest.—If, in the opinion of the Quartermaster General, the public interest shall so require, this contract may be terminated by the United States by 15 days' notice in writing from the Contracting officer to the contractor, and such termination shall be deemed to be effective upon the expiration of 15 days after the giving of such notice, and shall be without prejudice to any claims which the United States may have against the contractor under this contract. After the receipt of such notice the contractor shall not order any further materials or facilities, or enter into any further subcontracts, or make any further purchases in connection with the performance of this contract, without written consent previously obtained from the Contracting Officer. * * *

An order issued by the War Department directing the abandonment of war camps, including Camp Funston, was issued in December 1920. Thereupon instructions were issued to discontinue further purchases for certain Army camps, including Camp Funston. Such camps were shortly thereafter abandoned. Colonel James P. Barney, Chief of the Purchasing Division, Quartermaster Corps, directed Captain Hal T. Vigor, at that time procuring, purchasing, and contracting officer of this division, to prepare a list of all concerns furnishing fuel to Camp Funston and other war camps to be abandoned. Captain Vigor prepared the list which he delivered to Col. Barney and which was submitted by Col. Barney to H. L. Rogers, Quartermaster General. Col. Barney advised the Quartermaster General of the abandonment of said camps and suggested that the public

interest required the termination of all contracts to furnish fuel and forage to said camps, including Camp Funston. Upon consideration thereof the Quartermaster concluded and decided that the public interest required the termination of said contracts and he entered, in writing, his approval and action terminating the contracts, including the contract of plaintiff, on said list prepared by the contracting officer. Col. Barney thereupon, at the direction of the Quartermaster General, notified Capt. Vigor of the decision of the Quartermaster General and directed him to proceed with the termination of said contracts. Capt. Vigor, who had succeeded Capt. J. A. Lester as contracting officer on all fuel contracts, including the contract here involved, prepared telegrams in the name of the Quartermaster General to the Depot Quartermasters notifying them of the cancellation by the Quartermaster General of said contracts. The telegram with reference to the termination of plaintiff's contract is as follows:

WASHINGTON D C 150 PM FEB 8 1921

DEPOT QM
ST LOUIS MO
NOTIFY CHEROKEE FUEL COMPANY THEIR CONTRACT FOR CAMP FUNSTON CANCELLED THEY SHOULD MAKE CLAIM THROUGH YOUR OFFICE TO THE AUDITOR OF THE WAR DEPARTMENT FOR ANY DAMAGES WHICH THEY HAVE INCURRED BY REASON OF SUCH CANCELLATION CANCELLATION DUE TO ABANDONMENT OF CAMP FUNSTON ACKOWLEDGE RECEIPT N FOUR THREE A

ROGERS

February 8, 1921, the Depot Quartermaster at St. Louis sent a copy of the telegram quoted above to the plaintiff, and in his accompanying letter said:

With further reference to Contract #2635, attention is invited to copy of telegram received this day from Quartermaster General.

In compliance with these instructions, request that you make no further shipments on this contract, and if damages have been incurred by reason of this cancellation, claim to cover should be forwarded to this office for transmittal to the Auditor of the War Department.

Please acknowledge receipt of this communication.

14. On August 12, 1921, plaintiff filed its claim for $20,-562.48, submitting therewith a schedule showing sales, tonnage, and average selling prices from January 1, 1921, to June 30, 1921, f. o. b. mines. Said claim was disallowed by the General Accounting Office, the Quartermaster General, and the Secretary of War.

15. The expiration date of the contract was June 30, 1921. On that date, as well as the date on which the Quartermaster General terminated the contract, the supply officer at Camp Funston had issued schedule of delivery calls for the delivery of 3,461.15 tons of lump coal and of 7,500.10 tons of nut coal. January 31, 1921, and June 30, 1921, there remained 6,538.85 tons of lump coal and 12,499.90 tons of nut coal not covered by the schedule of delivery calls issued by the supply officer at Camp Funston and undelivered by plaintiff.

16. Plaintiff was not the producer of the coal specified in and delivered under its contract with the defendant. It operated under a selling agency arrangement with the Adair County Coal Company whose mines are located at Youngstown, Adair County, Missouri. All the coal delivered by plaintiff to defendant under the contract here in suit was obtained by plaintiff from these mines. Plaintiff was the exclusive selling agent for the Adair County Coal Company.

As soon as plaintiff secured the contract in suit from the Government, it submitted the same to the Adair County Coal Company and that company accepted the contract. When the defendant suspended deliveries at the end of January 1921, plaintiff suspended deliveries to it by the Adair County Coal Company to be applied on the contract with the defendant. The Adair County Coal Company made claim against plaintiff for alleged losses by reason of the termination of plaintiff's contract by the Quartermaster General. Upon completion of deliveries to and including January 31, 1921, pursuant to and in accordance with the schedule of delivery calls by the supply officer at Camp Funston, plaintiff had paid the Adair County Coal Company for all coal mined and delivered by such company to plaintiff. Prior to and during the period of deliveries under the contract in suit, plaintiff

had advanced to the Adair County Coal Company the amount of $50,000 with which to carry on its mining operations, which was to be repaid by deductions from the sales price of the coal sold by plaintiff as the exclusive selling agency of the mines. As selling agent, plaintiff received a commission of 6% on all coal sold.

17. Paragraph 19A of the contract provides as follows:

> It is agreed that if at any time during the continuance of the contract the wages so paid for the particular district are increased or decreased the prices agreed upon and provided for in the contract shall be increased or decreased accordingly.

In accordance with said provision of the contract, defendant allowed plaintiff the following wage increases:

	Per ton
8/16 to 8/31/20	$0.375
9/1 to 9/30/20	.375
10/1 to 10/31/20	.332
11/1 to 11/30/20	.285
12/1 to 12/31/20	.221
1/1 to 1/31/21	.199

The total tonnage of the coal delivered by the plaintiff to defendant was accepted and paid for at the contract price, including said wage increase.

18. During the period from January 1, 1921, to June 30, 1921, due to an unusual depression in the coal market, there was a greatly reduced demand for coal of the kind and quality covered by this contract.

During this period the market value of the run-of-mine coal of the quality covered by this contract declined to about 50 cents per ton, and the market value of lump coal of the quality contemplated by this contract declined to about $1.75 per ton.

19. During January 1921 the fair market value, f. o. b. Youngstown, Missouri, of the undelivered coal was as follows: lump coal, $2.125 per ton; and nut coal, $0.675 per ton. The undelivered 12,499.90 tons of nut coal (finding 15) at $0.675 per ton amounts to $8,437.43, the undelivered 6,538.85 tons of lump coal (finding 15) at $2.125 per ton

amounts to $13,895.06, making a total market price for the total undelivered nut and lump coal of $22,332.49.

20. The contract price on run-of-mine, or nut coal, was $2.65 per ton and the contract price on lump coal was $3.90 per ton. The price of 6,538.85 tons of undelivered lump coal at $3.90 per ton is $25,501.52; the price of 12,499.90 tons of undelivered nut coal at $2.65 per ton is $33,124.74; the total contract price of said undelivered coal is $58,626.26. The difference between the total price of all undelivered coal, calculated on the contract price ($58,626.26), and the total market price of all undelivered coal $22,332.49 (finding 19) is $36,293.77.

21. Defendant, pursuant to the provisions of Paragraph 19A of the contract, allowed plaintiff wage increases. The wage increase in effect at January 31, 1921, when deliveries were suspended, was $0.199 per ton (finding 17). This wage increase produced a price for nut coal of $2.849 per ton and a price at that time for lump coal of $4.099 per ton.

The original contract price plus the increase so allowed and in effect at the time deliveries were suspended and the contract was terminated by the Quartermaster General produced the following results: The 6,538.85 tons of undelivered lump coal at $4.099 per ton amounts to $26,802.75 and the 12,499.90 tons of undelivered nut coal at $2.849 per ton amounts to $35,612.22. These figures produce a total of $62,414.97 as the total contract price of all undelivered coal calculated at the original contract price plus the authorized increase in effect during the period January 1 to January 31, 1921. The total market price for all undelivered coal was $22,332.49 (finding 19). The difference between these totals is $40,082.48.

The court decided that the plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The contract between plaintiff and the defendant, represented by the Quartermaster Corps, United States Army,

was dated July 1, 1920, and was to continue in force until June 30, 1921, unless sooner terminated by the Quartermaster General in the public interest. The contract was for a total of 30,000 tons of bituminous coal, 10,000 tons of which was to be over 6″ screen and 20,000 tons nut through 2½″, to be furnished by plaintiff to Camp Funston, Kansas, in accordance with such "Schedule of Delivery" calls as might be issued by the supply officer at Camp Funston prior to June 30, 1921, and in accordance with shipping directions to be furnished by the Depot Quartermaster at St. Louis, Missouri. The contract also provided that at its expiration any undelivered coal not covered by schedule of delivery calls furnished by the supply officer at Camp Funston would be automatically canceled. This provision in Schedule A of the contract had no reference to the termination of the contract under section 2, but had reference only to the expiration of the contract by its terms. The contract in question was a standard form contract No. 108C of the Quartermaster Corps approved and authorized October 9, 1918, and the specific provisions thereof relating to the kind and quantity of coal, the unit price, the total contract price, and delivery thereof were set forth in that portion of the contract designated "Schedule A."

The documents used by the supply officer at Camp Funston on which he entered from time to time schedules of delivery calls for coal, which were furnished to plaintiff through the Depot Quartermaster at St. Louis, Mo., with shipping directions, were printed form "Q. M. C. Form 108G," authorized July 20, 1918, for use under the standard form contract for the furnishing of supplies and materials on which the supply officer filled in the schedule for the delivery, as needed, of the supplies or materials covered by the contract.

Plaintiff contends, first, that the total of 30,000 tons of coal specified in the contract was called for by the supply officer at Camp Funston within the meaning of the provision for schedule of delivery calls in Schedule A of the contract and that shipping directions therefor were furnished by the Depot Quartermaster at St. Louis, Mo., and that the defendant breached the contract on December 21, 1920, by refusing

to take deliveries and pay for 12,499.90 tons of nut coal and 6,538.85 of lump coal subsequent to January 31, 1921; and, second, that the contracting officer did not give the required fifteen days' notice and that the Quartermaster General did not terminate the contract in accordance with section 2 thereof. Finding 13.

It is clear from the record in this case that the supply officer at Camp Funston did not issue and deliver to plaintiff schedule of delivery calls for the entire quantity of 30,000 tons of coal specified in the contract within the meaning of the provisions of paragraph 2 and Schedule A of the contract. The entry by the supply officer on the printed forms of "Schedule of Delivery" calls of the total tonnage of coal specified in the contract under the heading "Quantity" in some of the calls issued by him was not a "Schedule of Delivery" call for the entire amount of coal. Under the printed heading "Point of Delivery and Schedule" the supply officer, in the early calls, which were at plaintiff's request modified by subsequent calls, issued schedule of delivery at the rate of a certain number of cars a month. In later calls he furnished a schedule of delivery for a certain number of cars a week, and in subsequent calls and in the calls in effect at the time deliveries were suspended under directions from the contracting division of the office of the Quartermaster General, the supply officer furnished plaintiff with schedule of delivery calls month by month for a certain number of cars per day. If the contention of the plaintiff that the entry by the supply officer under the heading "Quantity" of the printed form of schedule of delivery calls of the total tonnage of each class of coal specified in the contract was the furnishing by such supply officer of a "Schedule of Delivery Call" for that amount within the meaning of the contract, the contracting officer issued calls to the plaintiff for 95,650 tons of coal which was 65,650 tons in excess of the amount specified in the contract. The entry on the schedule of delivery forms of information other than as to the schedule of delivery of the coal was for information purposes only. The schedule of delivery of the coal, as specified by the supply officer, was the important and

controlling feature of the contract. The facts show that the Government accepted and paid for all coal for which the supply officer at Camp Funston furnished the plaintiff with schedules of delivery. Moreover, this contention of the plaintiff is not important in this case since the evidence conclusively shows that the Quartermaster General terminated the contract under and in accordance with the provisions of section 2 thereof. Plaintiff relies upon the cases of *Sinclair Coal Co.* v. *United States*, 65 C. Cls. 704, and *Midland Coal Co.* v. *United States*, 65 C. Cls. 717, but the record in this case distinguishes the facts found by the court in those cases, and the facts here disclosed show that plaintiff is not entitled to recover.

The evidence shows that the letter of the Depot Quartermaster at St. Louis, Mo., dated December 21, 1920, to plaintiff (finding 10), which plaintiff contends was a breach of the contract, was written by the Depot Quartermaster pursuant to instructions issued by the War Department to abandon Camp Funston and that such letter was written as the agent of the contracting officer. But in any event the evidence shows that the Depot Quartermaster at St. Louis did not cancel the contract but merely gave plaintiff notice to suspend deliveries awaiting action by the Quartermaster General with reference to termination of the contract. At the time the notice of December 21, 1920, was sent to plaintiff by the Quartermaster at St. Louis, Capt. Hal T. Vigor was the procuring, purchasing, and contracting officer of the Quartermaster Corps, and instructions from the Quartermaster's Department to discontinue further purchases and shipments of supplies to Camp Funston had been issued by reason of the transfer therefrom of the 7th Division of the Army. Subsequently, as shown by finding 13, the Quartermaster General determined that the public interest required the termination of plaintiff's contract and he, thereupon, terminated the same under the authority contained in section 2 after his office had determined that the undelivered portion of the total tonnage of coal specified in the contract could not be diverted or used by the Government at some other army camp.

Syllabus

At the time of the termination of the contract under section 2, no conditions existed entitling plaintiff to any compensation under the provisions of subsections (a), (b), (c), or (d) of section 2. Prior to the making of the contract between plaintiff and the defendant, and during the performance thereof and subsequently, plaintiff was the exclusive selling agent of the Adair County Coal Company, the owner of mines located at Youngstown, Missouri, from which plaintiff obtained the coal with which to fulfill its contract with the defendant. No recovery can be had here by reason of any advances made by plaintiff to the Adair County Coal Company. None of the undelivered portion of coal specified in plaintiff's contract was mined at the time the deliveries were suspended and the contract canceled. In its arrangement with plaintiff, so far as the contract in suit was concerned, the Adair County Coal Company, prior to the time of delivery of any coal under the contract, accepted the contract between plaintiff and the defendant.

The petition must therefore be dismissed. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

PHILADELPHIA BREWING COMPANY, PHILADELPHIA, PENNSYLVANIA, v. THE UNITED STATES

[No. 43429. Decided May 29, 1939; Defendant's motion for new trial overruled October 2, 1939]

On the Proofs

Capital stock tax return; time for filing.—Where corporation taxpayer on August 4, 1933, filed a capital stock tax return under Sections 215 and 216 of the National Industrial Recovery Act, and thereafter, on September 23, 1933, within the time allowed by the statute and by the regulations made pursuant to the statute, filed a corrected return, it is held that such corrected capital stock tax return was timely filed, although the corporation taxpayer had filed a capital stock tax return in which a different value had been declared.

Reporter's Statement of the Case

Same.—The corrected return was the "first return" on which, under the statute, subsequent excess profits taxes would be based.

Same.—The reference in subdivision (f) of Section 215 with respect to "the value as declared by the corporation in its first return under this section" should be interpreted to mean the value of the capital stock as finally declared by the corporation for its capital stock taxable year within the time allowed by statute and the regulations for making its capital stock tax return for such year.

Same.—The statute was not dealing specifically with returns as such but with value and taxable years.

The Reporter's statement of the case:

Mr. Theodore B. Benson for the plaintiff. *Mr. Charles E. Foster, Jr.*, was on the brief.

Mrs. Elizabeth B. Davis, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant. *Mr. Robert N. Anderson* and *Mr. Fred K. Dyar* were on the brief.

Plaintiff sues to recover $12,420.13, excess-profits tax for 1933. This profits tax was computed by the Commissioner of Internal Revenue on the basis of a value for plaintiff's capital stock tax of $1,500,000, which was the estimated value entered by plaintiff's president in a capital stock tax return for the year ending June 30, 1933, filed August 4, 1933, which value the plaintiff found to be erroneous and which it corrected, and on September 23, 1933, declared the value of the capital stock to be $3,499,999 in a corrected return prepared and filed in lieu of and as a substitute for the previous return, all within the time allowed by statute and Art. 55 of Regs. 64, as amended by Treasury Decision 4386 dated August 24, 1933.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff is a Philadelphia corporation with its principal office in Philadelphia, where it is engaged in the manufacture of malt beverages.

2. The plant which plaintiff was operating in 1933 had been acquired in 1928 by its president and principal stockholder, Joseph A. Slattery, at a cost of $250,000. At the

time of that acquisition the property was idle but it was used during the period from 1928 to 1933 in the manufacture of ice and malt beverages. With the repeal of prohibition in April 1933 and shortly prior thereto plaintiff began preparations for the manufacture of beer, and by April 1933 had a substantial amount of beer made and in its tanks. As a result plaintiff was in an advantageous position to proceed with the sale of beer when the prohibition amendment was repealed and it did a substantial and profitable amount of business from April 1933.

3. August 4, 1933, plaintiff filed a capital stock tax return for the year ending June 30, 1933, on the form (Form 707) provided therefor by the Treasury Department, and therein reported the declared value of its capital stock in the amount of $1,500,000. On the basis of that declared value plaintiff reported capital-stock tax due in the amount of $1,500, which it paid on the same date.

The return was prepared by plaintiff's president who arrived at the amount of the declared value on the basis of his estimate of the earnings for the year 1933, but at the time of its preparation he did not have before him an accurate statement of earnings for the period, and the return was prepared without the advice or assistance of an accountant.

4. Shortly after the capital stock tax return was prepared and filed August 4, 1933, plaintiff entered into negotiations with certain bankers in New York City for securing additional capital and at the latter's suggestion employed an accounting firm to make an audit of plaintiff's books. Plaintiff's books had not been kept in the most satisfactory manner and it was only after an examination by the accountants that an accurate statement of plaintiff's earnings was made available. When the accountants' report was furnished plaintiff's president showing earnings for the period April 7 to August 31, 1933, of $349,352.53, plaintiff's president and a member of the accounting firm came to the conclusion that a revision should be made in the declared value of plaintiff's capital stock as shown in its capital stock tax return for the year ending June 30, 1933. On the basis of the earnings disclosed by the audit the accountant estimated earnings for the full year of $475,000, and plaintiff's presi-

dent of $425,000. After giving consideration to these estimates the two individuals arrived at estimated earnings for the year which they capitalized on the basis of eight times such earnings and arrived at a value of plaintiff's capital stock of $3,500,000. Plaintiff thereupon prepared and executed a revised capital stock tax return for the year ending June 30, 1933, which showed a declared value of its capital stock in the amount of $3,499,999 and capital-stock tax due of $3,499.

That return was mailed to, and received by, the collector September 23, 1933, together with plaintiff's check in the amount of $1,999 (total tax shown due on second return, $3,499, less $1,500, tax paid on the filing of the original return). The return was accompanied by a statement reading as follows:

> This return is filed as a correction of the original return, within the period allowed for filing and for the purpose of setting forth the statutory declared value for the capital stock of this corporation.
>
> It is requested that this return be accepted in lieu of and as a substitute for the return originally filed.

5. September 27, 1933, the collector returned the revised or second return to plaintiff with a letter reading as follows:

> Reference is made to the enclosed Form 707 in duplicate and your remittance No. 1244 dated the 20th inst. in the amount of $1,999.00, said return being submitted as an Amended Capital Stock Tax Return for the year ended June 30, 1933.
>
> You are advised that the enclosures are returned in accordance with instructions received from the Commissioner of Internal Revenue that any Capital Stock Tax Return filed on or before September 29th, 1933, is regularly filed insofar as point of time is concerned and such return is the "first return" within the meaning of the Act. The law specifically provides that the value declared by a corporation "in its first return under this section" cannot be amended.
>
> In view of the specific provisions of the law, the original Form 707 filed by you for the year ended June 30, 1933, is your first return and inasmuch as the same cannot be amended, this office has no authority to accept the enclosed amended return and additional remittance.

6. The book value of plaintiff's stock as of August 31, 1933, was $1,414,925.01, which amount included an increase in the previous book value of approximately $1,279,000, on the basis of an appraisal made of the property as of that date, and the book value of the stock (cost) on the same date, after allowance for depreciation, and exclusive of the appraisal mark-up, was approximately $135,000.

7. March 9, 1934, plaintiff filed its income and excess-profits-tax return for the calendar year 1933, showing income tax due in the amount of $70,409.04, and excess-profits tax in the amount of $16,228.29. The total amount shown due, $86,637.33, was paid in four installments as follows: March 9, 1934, $21,659.33; June 15, 1934, $21,660.00; September 18, 1934, $21,659.00; and December 18, 1934, $21,659.00.

In that return the excess-profits tax was determined by the use of a declared value of the capital stock in the amount of $1,500,000.

8. On his December 1935 list the Commissioner assessed additional income and excess-profits tax for 1933 in the respective amounts of $2,281.85 and $829.76, which, together with interest in the amount of $334.90, was paid January 4, 1936, thus making the total income and profits taxes and interest paid for 1933, $90,083.84.

9. March 7, 1936, plaintiff filed a claim for refund of excess-profits tax and interest for 1933 of $17,147.36, representing the excess-profits tax paid of $16,228.29 on the original return, $829.76 additional assessment, and $89.31 interest. In that claim plaintiff alleged that its excess-profits tax should be determined on the basis of the declared value of its capital stock in the amount of $3,499,999, as shown in the return forwarded to the collector September 23, 1933. Plaintiff further alleged that the value of its capital stock in the amount of $1,500,000 as stated in the return filed August 4, 1933, and in the excess-profits-tax return filed March 9, 1934, was understated and that the actual value was $3,499,999.

The Commissioner rejected the claim for refund and notified plaintiff of such rejection by registered letter dated May 26, 1936.

The court decided that the plaintiff was entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

By section 215 [1] (a), (d), and (f), of the National Industrial Recovery Act a capital stock tax was imposed on the adjusted declared value of the capital stock of domestic corporations. In section 216 [2] (a) an excess-profits tax was imposed for each income-tax year subsequent to June 30, 1933. Regulations 64 (1933 Edition) were promulgated by the Treasury Department for the administration of the capital stock and excess profits tax act, and Art. 24 thereof provided as follows:

> *Adjusted declared value.*—Pursuant to the foregoing provisions of the Act each domestic corporation is re-

[1] (a) For each year ending June 30 there is hereby imposed upon every domestic corporation with respect to carrying on or doing business for any part of such year an excise tax of $1 for each $1,000 of the adjusted declared value of its capital stock.

(d) Every corporation liable for tax under this section shall make a return under oath within one month after the close of the year with respect to which such tax is imposed * * *. Such return shall contain such information and be made in such manner as the Commissioner with the approval of the Secretary may by regulations prescribe. * * * The Commissioner may extend the time for making the returns and paying the taxes imposed by this section, under such rules and regulations as he may prescribe with the approval of the Secretary, but no such extension shall be for more than sixty days.

(f) For the first year ending June 30 in respect of which a tax is imposed by this section upon any corporation, the adjusted declared value shall be the value, as declared by the corporation in its first return under this section (which declaration of value can not be amended), as of the close of its last income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section * * *. For any subsequent year ending June 30, the adjusted declared value in the case of a domestic corporation shall be the original declared value plus (1) the cash and fair market value of property paid in for stock or shares, (2) paid-in surplus and contributions to capital, and (3) earnings and profits, and minus (A) the value of property distributed in liquidation to shareholders, (B) distributions of earnings and profits, and (C) deficits, whether operating or nonoperating; each adjustment being made for the period from the date as of which the original declared value was declared to the close of its last income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section (48 Stat. 195, 207).

[2] (a) There is hereby imposed upon the net income of every corporation, for each income-tax taxable year ending after the close of the first year in respect of which it is taxable under section 215, an excess-profits tax equivalent to 5 per centum of such portion of its net income for such income-tax taxable year as is in excess of 12½ per centum of the adjusted declared value of its capital stock * * * as of the close of the preceding income-tax taxable year * * * determined as provided in section 215.

> quired to declare a value for its entire capital stock as of the close of the last income-tax taxable year ending on or prior to June 30, 1933, or as of the date of organization in the case of a corporation having no income-tax taxable year ending on or prior to that date. This value once having been declared may not subsequently be changed either by the corporation or by the Commissioner.
>
> It should be borne in mind that the original declared value will not only be used as the basis of payment of the capital stock tax for the first taxable year ended June 30, 1933, but that it will also be a primary factor in the computation of capital stock taxes for later years and the excess-profits tax imposed by section 216 of the Act.

Art. 55 of these regulations as originally promulgated provided as to the time for making the return that "It shall be the duty of every corporation to make a return for each taxable year during the month of July next following the end of such year, or later in case the time for filing is officially extended by the Commissioner under these regulations." Subsequently the time for filing the capital stock tax return for the fiscal year ending June 30, 1933, for which year domestic corporations were required by statute to make a declaration of the value of their capital stock, was officially extended by the Commissioner to September 29, 1933.

Sections 215 and 216, above-mentioned, levied new taxes. A capital stock tax was imposed for the fiscal year ending June 30, 1933, and for each year thereafter, and an excess-profits tax was levied for each income tax year ending after the close of the first capital stock tax year. The capital stock tax for the first year was imposed upon the value of the capital stock declared by the taxpayer and referred to in the statute as the adjusted declared value. For subsequent years the tax was imposed on the basis of the declared value with the authorized statutory adjustments. The excess-profits tax was imposed and measured by the "adjusted declared value" declared by the corporation for the first taxable year, that is, the declared value as of the close of the corporation's last taxable year ending on or before June 30, 1934. The capital stock tax was imposed for each year ending June 30 and the excess-profits tax for

each income taxable year. Congress expressly declared its intent that the original declared value in the capital stock tax return for the first taxable year under the statute should be used in determining the capital tax for subsequent years and that the adjusted declared value as of the close of the preceding income tax year should be used in determining the excess profits for each year. The amount of $12,420.13 sued for represents the alleged overpayment of $13,705.09 excess-profits tax, and $564.03 income tax, and interest of $150.01 paid for the calendar year 1933 less $1,999, capital stock tax admitted to be due and tendered by plaintiff for the first taxable year ending June 30, 1933.

In the case at bar, the plaintiff, before it had made a complete investigation for the purpose of determining the value of its capital stock, prepared and filed a capital stock tax return on August 4, 1933, in which it stated the value of its capital stock in the amount of $1,500,000. This return was prepared by plaintiff's president, who arrived at the amount of this value on the basis of the estimated earnings of the corporation, but at the time he did not have before him an accurate audit and statement of the earnings of the corporation; a complete audit of the books and records of the corporation by a qualified accountant had not at that time been made. Plaintiff's president did not at that time have full knowledge of the actual facts. Shortly afterward, and still within the time allowed by statute and the Commissioner's regulations authorized and made pursuant thereto within which the plaintiff could file its capital stock tax return for the year ending June 30, 1933, and make the declaration of value of the capital stock as required by the statute, the plaintiff after a complete audit of its books and on the basis of the earnings for the full year which it capitalized, determined and declared to the Commissioner in a corrected capital stock tax return, in lieu of and as a substitute for the return theretofore submitted on August 4, 1933, a declared value of its capital stock of $3,499,999 to be used as the declared value in its return for the first year and subsequent years for the purpose of the capital stock and excess-profits tax. This declared value, which was set forth in a corrected capital stock tax return, was made and the

corrected return was filed with the collector September 23, 1933, before the expiration of time allowed by the statute and the regulations for filing the 1933 return and for declaring the value of capital stock for its first taxable year for the purpose of the capital stock and excess-profits tax imposed by sections 215 and 216. The time within which to make its declaration of value of its capital stock did not expire until September 29, 1933, and we think, in the circumstances, the proper interpretation of the statute, in the light of the facts and the reports of the Congressional committees [3] is that plaintiff could, before the expiration of the time for filing its capital stock tax return, proceed to file with the Commissioner its final and corrected declaration of value of its capital stock in a corrected capital stock tax return, even though the corporation had filed a capital stock tax return in which a different value had been declared.

With respect to the first taxable year in which the statute required the corporation to make a declaration of the value of its capital stock, we think it is clear that the statute intended that a taxpayer should have the right until the expiration of the time for filing its capital-stock tax return for that year to make its declaration of the value of its capital stock which was to be thereafter binding and used as a basis for the determination of the excess-profits tax in its first and subsequent income-tax years ending after the close of the first capital-stock tax year. From this the reference in subdivision (f) of section 215 of the National Industrial Recovery Act with respect to "the value as declared by the corporation in its first return under this section" should be interpreted to mean the value of the capital stock as finally declared by the corporation for its capital-stock taxable year within the time allowed by statute and the regulations for making its capital-stock tax return for such year. This interpretation conforms to the declared purpose of the Act.

In the Conference Report on Section 701 of the Revenue Act of 1934 (48 Stat. 680, 769), which carried forward the provisions of section 215 of the National Industrial Recovery

[3] Senate Committee Report No. 114, 73rd Con., 1st Sess. Conference Report No. 13185.

Act (Congressional Record, Vol. 78, Part 7, p. 7827), it was said by the managers on behalf of the House of Representatives that "For the first year the tax is measured by the value of the capital stock as declared by the corporation as of the close of its last taxable year ending on or before June 30, 1934. The value of the capital stock having been declared for the first year, such value may not be subsequently amended." Inasmuch as the primary purpose of the statute was to require the taxpayer to make a declaration of the value of its capital stock at the close of its last capital-stock tax year ending on or before June 30, 1934, and to be subsequently bound thereby in subsequent capital-stock tax years and each income-tax year ending after the close of the first taxable capital-stock year, no reasonable rule of interpretation requires the conclusion that the corporation may not, within the time allowed for filing a capital stock-tax return for the first year, declare the value of its stock upon which it intends to stand and be bound in subsequent years in a timely corrected or amended return disclosing a declared value different from the value previously stated in a capital stock-tax return filed for such year. *Glenn* v. *Oertel Company*, 97 Fed. (2d) 495. The statute was not dealing specifically with returns as such, but with value and taxable years.

Plaintiff is entitled to recover and judgment in its favor for $12,420.13 will be entered. It is so ordered.*

WHALEY, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

ORDER

This case comes before the court on stipulation of the parties filed June 16, 1939, in which it is stated that they "stipulate and agree that judgment should be entered for the net amount of $10,994.69 instead of $12,420.13 as ordered by the court", and "that interest on the net amount of $10,994.69 should be computed on the following amounts from the following dates: $1,223.51 from January 4, 1936; $4,057.07 from

*(Defendant's second motion for new trial overruled, January 8, 1940. See *Haggar Company* v. *Helvering*, 308 U. S. —, decided, January 2, 1940.)

December 18, 1934; $4,057.07 from September 18, 1934; $1,657.04 from June 15, 1934." Therefore, on consideration thereof, it is ordered this 19th day of June 1939, that the judgment entered in this case May 29, 1939, be, and the same is, vacated and withdrawn and a new judgment in favor of the plaintiff be this day entered in the sum of ten thousand, nine hundred ninety-four dollars and sixty-nine cents ($10,994.69), with interest on $1,223.51 from January 4, 1936, on $4,057.07 from December 18, 1934, on $4,057.07 from September 18, 1934, and on $1,657.04 from June 15, 1934, to such date as the Commissioner of Internal Revenue may determine in accordance with the provisions of section 177 (b) of the Judicial Code, being a part of the Revenue Act of 1928.

RIO CAPE LINE, LIMITED, v. THE UNITED STATES

[No. 43281. Decided June 5, 1939]

On the Proofs

Immigration Act; notice to owner or agent of vessel.—Where a British ship, *Chinese Prince*, upon entering Boston harbor, was found to have on board 20 members of the Chinese crew who were designated by an immigration inspector as *mala fide* seamen, and where an order issued by the immigration inspector for the detention on board ship of the said 20 alien seamen was accepted on behalf of the master of the ship by the purser, but said order was not served on the owner of the vessel, nor its agents, it is held that the fine imposed upon the agents, and paid by them, for the escape of 15 of the said alien seamen, was illegally imposed.

Same.—Notice served only on the master of a vessel does not impute any duty to the agent or to the owner. *Compagnie Generale Transatlantique* v. *Elting*, 298 U. S. 217, and cases therein referred to, cited.

Fines unlawfully collected.—Voluntary payment of fines, if unlawfully collected, will not prevent recovery.

Same; involuntary payment.—Deposit of bond, covering liability for fine that might be imposed, in order to obtain clearance of vessel, and subseqent payment, were not such voluntary acts as to prevent recovery.

Reporter's Statement of the Case

Immigration Act; proper notice of detention.—Notice of liability for the fine, directed to the agents of the owner, and submission by the agents of a letter from the master showing why, in their opinion, no penalty should be imposed, did not constitute action that validated the failure to make a foundation for the case by a proper service of the notice of detention.

Jurisdiction.—The cases of *Algoma Lumber Co.*, 305 U. S. 415; *Alabama*, 282 U. S. 502, and *Baltimore Mail Steamship Co.*, 76 Fed. (2d), 582, distinguished.

Same.—Suits to recover penalties under the immigration statutes are maintainable under the Tucker Act.

The Reporter's statement of the case:

Mr. Delbert M. Tibbetts for the plaintiff. *Mr. Charles R. Hickox* and *Kirlin, Campbell, Hickox, Keating & McGrann* were on the briefs.

Mr. W. S. Ward, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant. *Mr. Maurice W. Hibschman* was on the brief.

The court made special findings of fact as follows:

The plaintiff is a British corporation and is and was, at all material times, the owner and operator of the steamship *Chinese Prince*. It owns the claim sued on free from any offsets or credit, and otherwise qualifies for the maintenance of a suit in this court.

The *Chinese Prince* arrived at the Port of Boston, Massachusetts, on September 30, 1929, with an alien Chinese crew. Shortly after the arrival of the vessel, and on the same day, an immigration inspector at Boston purporting to act in accordance with section 20 of the Immigration Act of 1924, and as a result of some information received by him, issued an order for the detention of twenty members of the crew, named therein and designated as *mala fide* seamen. This order was accepted on behalf of the master by the purser, who receipted for it, "Thomas Goldsworthy, purser, for master."

The master acted upon the order, and issued instructions that no shore leave be granted to any of the members of the crew listed in it.

The vessel proceeded from Boston to New York, where she arrived on October 2, 1929. No notice to detain any of the crew was served on anyone at that port. After remaining at New York until November 2, 1929, the vessel proceeded to Newport News, Virginia, where she arrived on November 3. No notice to detain any of the crew was served at that port. On November 4, 1929, the immigration inspector at Newport News found that fourteen of the twenty alien members of the crew who had been ordered to be detained at Boston were not on board the vessel, and on November 5, 1929, one more of the twenty, Ching Chung Ching, was found to be missing. These fifteen aliens had escaped and were not thereafter found.

On November 4, 1929, a notice was issued by the immigration inspector in charge at Norfolk to Furness, Withy & Company, Ltd., agents for the vessel at Newport News and Norfolk, in accordance with Rule 22 of the Immigration Rules of March 1, 1927, to the effect that information in possession of that office indicated that there had been a violation of the provisions of section 20 of the Act of May 26, 1924, in the case of fourteen alien seamen, as set out therein; that a fine of $14,000 was proposed; and that sixty days would be allowed within which to offer a defense showing why no penalty should be imposed. On November 6, 1929, a similar notice was addressed to the same party in relation to a proposed fine of $1,000 in the case of the fifteenth alien, Ching Chung Ching.

On November 4, 1929, upon receipt of the notice of intention to fine, G. W. Pierce, as manager of Furness, Withy & Company, Ltd., and the Indemnity Insurance Company of North America executed and delivered a bond to the Collector of Customs at Newport News in a penal amount of $14,000 conditioned for the payment of any fine or fines found due and payable by the Secretary of Labor under the provisions of the Immigration Act of 1924. This bond was executed and delivered in accordance with the practice then in effect in order to secure clearance of the *Chinese Prince*. The *Chinese Prince* sailed from Newport News on November

5, 1929. On November 6, 1929, a similar bond was executed and delivered to the Collector of Customs conditioned for the payment of the proposed fine of $1,000.

Under date of February 21, 1930, E. E. Jones, master of the *Chinese Prince*, and Furness, Withy & Company, Ltd., in answer to the notices of November 4 and 6, 1929, addressed a letter to the Director, United States Immigration Service, at Norfolk, Virginia, requesting that fines be remitted, or mitigated to a nominal sum, on the ground that every effort had been made by the master to prevent the escape of the seamen, and that the master believed them to be *bona fide* seamen. This letter states in part:

> Owing to the fact that the immigration inspector at Boston had received certain information, he ordered detained on board as not bona fide seamen twenty out of the total thirty members of the Chinese crew. Strict instructions were issued by the master that no shore leave be granted to any member of the crew, except those permitted to do so by the inspector, which were further amplified by the master issuing instructions that no officer be permitted to issue passes and that all passes for shore leave were to be issued by himself.
>
> This information was passed on to the watchmen engaged both day and night to guard the vessel and to prevent any stowaways. Five guards being on watch at all times. In spite of these precautions it appears there was an alleged desertion of fifteen members of the Chinese crew.
>
> We respectfully contend that everything humanly possible to prevent any of the detained men from getting ashore was done in this case, and that the master of the vessel did everything possible to carry out the United States Immigration Regulations.

The above letter was sworn to before a notary public.

On February 24, 1930, Furness, Withy & Company, Ltd., forwarded a duplicate of the letter to Mr. Edwin B. Schmucker, District Director, U. S. Immigration Service.

On February 28, 1930, the Board of Review of the Department of Labor considered the record, including the letters of February 21 and 24, 1930, and recommended that fines in the amount of $15,000 be imposed, and upon this recommendation such fine was ordered by the Assistant to the Secretary of Labor.

On April 1, 1930, Furness, Withy & Company, Ltd., paid to the Collector of Customs by its check the amount of said penalties, $15,000, which amount was deposited by the collector in the Treasury of the United States.

This payment was made to comply with the conditions of the bonds which had been filed by the agents of the plaintiff and in its behalf, as above recited.

Demand for the repayment of this amount was made upon the Secretary of the Treasury under date of February 19, 1936. This suit was filed on March 11, 1936.

The court decided that the plaintiff was entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

This is an action by the Rio Cape Line, Ltd., owner of the steamship *Chinese Prince*, for the recovery of $15,000, being the amount of fines imposed and collected from plaintiff by the officials of the defendant because of the failure of the master of the *Chinese Prince* to detain on board fifteen alien members of his crew after an order for their detention had been issued by an immigration inspector.

Plaintiff is a British corporation and its ship, the *Chinese Prince*, arrived in Boston in September 1929, having an alien crew. An immigration inspector, after inspecting the crew, served on the purser of the vessel a notice or order that twenty of the crew should be detained on board. The purser signed a receipt of the notice "Thomas Goldsworthy, purser for master." The vessel proceeded from Boston to New York and from New York to Newport News without any further notice, but an immigration inspector at Newport News found that fifteen of the seamen who had been ordered detained at Boston were not aboard.

Furness, Withy & Company, Ltd., were the agents of the vessel at Newport News and Norfolk. Shortly after the arrival of the vessel at Newport News the agents were served with notices from the immigration inspector there that fines in the amount of $15,000 were claimed on account of the escape of the fifteen seamen, and these notices granted sixty days' time in which a defense might be offered showing why no penalty should be imposed.

On November 4 the steamship *Chinese Prince* was at the port of Newport News making ready to sail. The practice then in effect required the Collector of Customs on receipt of a notice of liability for such penalties to refuse clearance to the vessel until the amount claimed in the notice had been deposited with the collector, or until bond satisfactory to the collector should be furnished. Both the collector and the agents of the vessel at Newport News were aware of this practice and in order to secure clearance of the vessel, the manager of the agents executed bonds in the amount of $15,000 conditioned on the payment of any fines incurred by the steamship *Chinese Prince* and found by the Secretary of Labor to be due and payable under the provisions of the Immigration Act. The bonds also recited that clearance papers could not be obtained until such liability was determined and fines and penalties paid unless a bond was filed; and, further, that the principal was to have the privilege of making such payments under protest and without prejudice to any legal rights of recovering by appropriate action all sums so paid as fines under the bonds.

The *Chinese Prince* sailed from Newport News on November 5, 1929. On April 1, 1930, Furness, Withy & Company, Ltd., paid to the Collector of Customs $15,000 which was deposited in the Treasury of the United States. No protest was made to the collector at the time of this payment but demand was made for the repayment thereof on February 19, 1936.

The plaintiff alleges that the amount of the fines was illegally and wrongfully collected from it on the ground that the plaintiff was not served with notice of the order to detain the members of the crew who subsequently escaped, and that the payment of the fines was not voluntary but was made under duress in order to obtain clearance papers for the steamship *Chinese Prince* so that it could continue its voyage.

The defendant contends that sufficient service was made to bind the owners, and that the fines were legally imposed and voluntarily paid.

Opinion of the Court

The question of whether the fines were legally collected depends on whether the notice to detain the alien seamen was served on the party from whom the fine was collected in the manner provided by law.

The statute under which the fines were imposed is section 20 (a) of the Immigration Act of 1924, c. 190, 43 Stat. 164, 8 U. S. C. 167 (a), which provides:

> The owner, charterer, agent, consignee, or master of any vessel arriving in the United States from any place outside thereof who fails to detain on board any alien seaman employed on such vessel until the immigration officer in charge at the port of arrival has inspected such seaman (which inspection in all cases shall include a personal physical examination by the medical examiners), or who fails to detain such seaman on board after such inspection or to deport such seaman if required by such immigration officer or the Secretary of Labor to do so, shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of $1,000 for each alien seaman in respect of whom such failure occurs. No vessel shall be granted clearance pending the determination of the liability to the payment of such fine, or while the fine remains unpaid, except that clearance may be granted prior to the determination of such question upon the deposit of a sum sufficient to cover such fine, or of a bond with sufficient surety to secure the payment thereof approved by the collector of customs.

In *Compagnie Generale Transatlantique* v. *Elting*, 298 U. S. 217, 223, 224, it is said with reference to the imposition of a fine for failing to detain seamen after examination by the immigration officer that—

> A duty so to detain does not arise unless and until such detention is required by the immigration officer. Obviously the requirement must be communicated to the one on whom the duty is to rest; otherwise he could not be regarded as "required" so to detain or as "failing" to do so.

A comparison of the facts in the case above cited with those which appear in the case at bar will show that the two cases are quite similar. In the case before us the

notice to detain was served upon the purser who accepted service for the master. A purser whose duties relate merely to some financial matters has no authority to bind the master. The master, however, must have known of the notice as he ordered that no shore leave be granted to the members of the crew whom the notice required to be detained. Thus the requirement was "communicated" in some way to the master. The master was thus bound but what is further said in the *Compagnie Generale case*, *supra*, shows that no one else was. The opinion in the case last cited recites:

> Here the requirement was communicated to the master of the ship but was not in any way brought to the knowledge of the owner; and yet the administrative officers imposed the fine on the latter. The court below sustained this administrative action on the theory that the master of a ship represents the owner, and therefore notice given to the master may and should be imputed to the owner. But in our opinion the section does not admit of the application of that theory. It contains nothing indicative of a purpose to regard notice to one of the enumerated persons as binding the others or any of them. On the contrary, it deals with all in the same way, includes each of them in the enumeration by reason of his relation to the vessel and his authority over her, and puts each on a plane of individual duty and liability regardless of any relation of one to another.

Also:

> A master in charge who is required by the immigration officer to detain alien seamen after examination becomes thereby personally charged with a duty to detain them, and, if he fails therein, becomes personally subject to the prescribed fine. The same thing is true of the owner, charterer, agent or consignee. But none is charged with a duty so to detain unless he is notified of that requirement, and notice to one does not without more operate as notice to another.

The court also cited with approval the decision in *United States* v. *J. H. Winchester & Co.*, 40 Fed. (2d) 472, to the effect that an order served only on the master of a vessel did not impose any duty on the agent and therefore he was not

liable for the failure to detain. The case of *Lancashire Shipping Co.* v. *Elting*, 70 Fed. (2d) 699, is cited to the same effect and the court concludes with the statement that—

> Nothing in the section indicates that notice to the master and a failure by him are to be imputed to the owner and made a basis for fining the latter.

There is no evidence in the instant case that the detention notice was served upon either the agents or the owner and no claim is made that either of them had any knowledge thereof except as acquired after the escape of the seamen by reason of the notice of the proposed fine being served. It seems clear that so far as the owner or agents are concerned, the provisions of the statute as construed by the Supreme Court had not been complied with. In the case now on trial it is sought to hold the owner liable by reason of service of the notice of detention upon the master. This, under the rules laid down by the Supreme Court, cannot be done.

It is contended on behalf of defendant that the fines were paid voluntarily and having been so paid cannot be recovered.

We think that even if it had appeared that the fines were paid voluntarily, this would not prevent a recovery thereof if they were in fact unlawfully collected, but it is not necessary to so hold in the case before us. When the notices of liability were issued by the immigration inspector at Newport News together with bills for the amount thereof, copies of the notices and bills were delivered to the Collector of Customs and also to the Newport News office of the owner of the vessel. The Collector of Customs was authorized on receipt of such notices and bills to refuse clearance of the vessel until the amount named therein had been deposited with the collector, or a bond satisfactory to the collector furnished, and the notices of liability under the fine stated that the vessel would be granted clearance papers upon a deposit of the amount of the proposed fine or upon furnishing a satisfactory bond. We think that when a vessel could not obtain a clearance to continue its voyage until these conditions were complied with, the filing of the bond by the agent and

the subsequent payment by the owner were not such voluntary acts as to prevent the plaintiff from recovering the amount paid. The cases are so numerous supporting this holding we think it is not necessary to mention them.

It is further urged on behalf of the defendant that the action of the plaintiff in presenting to the immigration authorities a letter from the master of the vessel giving his version of the matter constituted a full appearance in the case and ratified all the proceedings with reference to the notices. The notice of liability for the fine was directed to and served upon the agents of the owner. It advised the agents that they would be allowed a period of sixty days in which to offer a defense showing why, in their opinion, no penalty should be imposed. To this notice the agents responded enclosing a letter from the master giving reasons why, in his opinion, the fine should not be imposed. The Board of Review considered the statement of the master, treated it as a protest against the imposition of the fine, but recommended that the penalty be imposed. There was nothing in the action taken by the agents and the master that validated the failure to make a foundation for the case by a proper service of the notice of detention. To sustain this contention on behalf of the defendant the case of *United States* v. *S. Manessis, Master of Panamanian Steamship "Mount Ossa," and National Surety Corporation of New York*, decided November 12, 1938, by the District Court of the United States for the Eastern District of Virginia (Norfolk Division) is cited. The opinion rendered in that case shows that the notice of detention was served upon the master and the fine was imposed upon the master. But the opinion distinguishes it from the case of *Compagnie Generale, supra*, where, like the case at bar, neither the agents nor the owner had any knowledge of the service of the notice to detain until after the escape. The *Manessis case, supra*, is not therefore any authority to sustain the defendant's contention.

The plaintiff also contends that the notice of detention was not such as was required by the statute. It is said that the statute requires the notice to be given by "such

Opinion of the Court

immigration officer or the Secretary of Labor," and that these words refer to "the immigration officer in charge at the port of arrival" mentioned in the first part of the section under which the fines were imposed as set out above. The notice was signed by the immigration inspector who is not the immigration officer in charge at the port. We are inclined to the view that, in line with what is quoted from the Supreme Court decision, the statute must be literally complied with in respect to the notice itself as well as the manner of service, but in view of the fact that knowledge of the detention order was not brought to the agents or owner until after the escape, we do not rest our decision upon the insufficiency of the notice itself.

Lastly, the defendant contends that this court is without jurisdiction to entertain the action. More specifically stated, the defendant's contention is that this suit is on a contract implied in law and is not maintainable under the Tucker Act. In support of this contention the defendant cites *United States* v. *Algoma Lumber Co.*, 305 U. S. 415; *Alabama* v. *United States*, 282 U. S. 502; and *Baltimore Mail Steamship Co.* v. *United States*, 76 Fed. (2d) 582. The cases relied upon by defendant involve altogether different facts from those which appear in the instant case. In fact, the nature of the actions and the circumstances of each case are so dissimilar to the case at bar that we do not think it is necessary to review them. The decisions therein furnish no foundation for the contention made by the defendant.

Nor do we think it is necessary to consider defendant's contention that suits to recover penalties under the immigration statutes are not maintainable under the Tucker Act. In many such cases the courts have entered judgment in favor of the plaintiff, and while the matter has not been directly passed upon by the Supreme Court the judgments of the lower courts have been affirmed.

Plaintiff is entitled to recover the amount of fines paid and judgment will be entered accordingly.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

ARTHUR CHERRY v. THE UNITED STATES

[No. 43275. Decided October 2, 1939]

On the Proofs

Pay and allowances; enlisted man in the Army; thirty years' service.—Where an enlisted man in the United States Army, serving as master sergeant, filed an application for retirement before he had served the thirty years stipulated by the statute for retirement, and where after filing said application plaintiff was demoted and then consented to the withdrawal of his application for retirement, it is held that since his statutory right to retirement had not become vested in him while he was serving as master sergeant, he is not entitled to the retired pay of master sergeant.

Same.—Where plaintiff was serving as first sergeant when his right to retirement became vested by virtue of thirty years' service, it is held that he was entitled to be retired only with the pay and allowances of first sergeant.

Same.—The cases of *Blackett* v. *U. S.*, 81 C. Cls. 884; *Standerson* v. *U. S.*, 83 C. Cls. 633, and *Holub* v. *U. S.*, 85 C. Cls. 701, are distinguished.

Same.—The Act of March 2, 1907, grants an enlisted man a right which cannot be circumscribed by any one or in any way after the period of thirty years stipulated in the Act has been served.

The Reporter's statement of the case:

Mr. Mahlon C. Masterson for the plaintiff. *Mr. Samuel T. Ansell* and *Ansell, Ansell & Marshall* were on the briefs.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff enlisted in the United States Army January 19, 1904, and served therein under numerous reenlistments until on June 6, 1934, after deducting the time elapsed between certain discharges and reenlistments, he had been in the Army 30 years and 31 days. During the time he had thus been in the Army he had lost 31 days of service as a result of sickness not in line of duty, leaving a record on June 6, 1934, of 30 years of actual service.

He was appointed master sergeant May 1, 1934.

2. May 4, 1934, to the appropriate officer, and through the appropriate channels, plaintiff applied for retirement at Fort Benning, Georgia.

Plaintiff was eligible for retirement June 6, 1934.

3. May 17, 1934, the adjutant general advised plaintiff's commanding officer at Fort Benning as follows:

> 1. Referring to the retirement application of Master Sergeant Arthur Cherry, R. 154214, Infantry School Detachment, the records of this office show that this soldier has served 29 years, 11 months and 10 days. The records further show that he lost 31 days through sickness not in line of duty during enlistment of June 19, 1915, which has been deducted from his service.
> 2. Sergeant Cherry will be eligible for retirement June 8, 1934, provided he has no absences under the 107th Article of War in the meantime. At the proper time orders will be issued by the War Department directing retirement effective June 30, 1934. Report any unauthorized absences prior to date of eligibility for retirement.
> By order of the Secretary of War.

There is an error of two days in the Adjutant General's calculation of the date of plaintiff's eligibility for retirement. See Findings 1 and 2.

4. On June 4, 1934, while holding his appointment as master sergeant, plaintiff was reduced to the rank of private and therefrom promoted to be sergeant, and by the same order Sergeant John W. Heckert was promoted to be master sergeant.

5. On June 5, 1934, there was issued to the commanding general at Fort Benning, plaintiff's superior officer, the following order:

> 1. Pending further instructions promotions to the grade of Master Sergeant Infantry, Field Artillery, and Cavalry are suspended.
> 2. This suspension is for the purpose of absorbing a surplus master sergeant, detached enlisted men's list (Organized Reserves), ordered to this corps area by the War Department for absorption. The necessity for this action is regretted.
> 3. The first vacancy in the grade of master sergeant will be reported to this headquarters.
> By command of Major General Moseley.

6. On June 7, 1934, Captain C. W. Pence, executive officer of the detachment in which the plaintiff was serving, asked plaintiff if he would consent to withdraw his application

for retirement until the surplus master sergeant, hereinbefore referred to, had been absorbed. Plaintiff, in response to this question, replied that he consented to the withdrawal of his application. It was not returned to him or at any time rejected.

7. On October 1, 1934, the plaintiff filed another application for retirement, having given additional service in the Army continuously from June 6, 1934.

On the same day, viz, October 1, 1934, plaintiff was promoted to be a first sergeant.

8. On October 11, 1934, by special orders, plaintiff was ordered to be retired in the grade of first sergeant, effective October 31, 1934.

9. If it is held that plaintiff is and was entitled to retired pay as master sergeant he would be entitled to $620.08 additional to that which he has already received for the period beginning November 1, 1934, and ending February 29, 1936. The claim is a continuing one.

The court decided that the plaintiff was not entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the court:

This action is brought for the purpose of recovering the difference between the retired pay of a first sergeant and that of a master sergeant of the Army.

Plaintiff filed two applications for retirement. The first was made before he had served thirty years and the second after he had been reduced from master sergeant to private and then promoted to first sergeant. The action is based on the act of March 2, 1907, 34 Stat. 1217, 1218, which provides:

> That when an enlisted man shall have served thirty years in the Army, Navy, or Marine Corps, or in all, he shall, upon making application to the President, be placed upon the retired list, with seventy-five per centum of the pay and allowances he may then be in receipt of * * *.

When plaintiff first made his application for retirement, he had not served thirty years. When he was notified of

this fact and also that he had been demoted from master sergeant before the thirty years had been served, he withdrew his application and was a sergeant when the period provided in the statute entitled him to retire. Plaintiff was afterwards promoted from sergeant to first sergeant and while serving in this capacity he made a second application for retirement. When this second application was made, he had served thirty years and the right given to him in the statute had vested. He was, therefore, entitled to be retired with three-fourths of the pay and allowances which he was then receiving and plaintiff was retired as a first sergeant and has been receiving the pay and allowances provided for in this grade.

It will be seen that this case differs from the cases of *Blackett* v. *United States*, 81 C. Cls. 884; *Standerson* v. *United States*, 83 C. Cls. 633; and *Holub* v. *United States*, 85 C. Cls. 701. In these cases the thirty years' service had been attained before application was made and it was held in these cases that the plaintiff had a right to retire upon making application for retirement and no demotion could prevent him from receiving the pay and allowances provided for in the grade in which he was serving at the time the application for retirement had been made to the President. The act grants an enlisted man a right which could not be circumscribed by anyone or in any way after the thirty years had been served.

In the instant case, the right to retire had not become vested when plaintiff made his first application. When the right did mature, he was serving in the grade of sergeant and no application was pending, the first one having been withdrawn. When the second application was filed, the right had vested in him, under the statute, to be retired in the grade he was then serving, which was first sergeant and not master sergeant, and he was entitled to be retired only with the pay and allowances of that grade.

Plaintiff was retired and has received the pay and allowances in the grade in which he was serving at the time of the filing of his only existing application, and is entitled to nothing more.

There can be no recovery. The petition is dismissed. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* and GREEN, *Judge*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

JAMES B. BENNETT v. THE UNITED STATES

[No. 43467. Decided October 2, 1939]

On the Proofs

Civil Service Retirement.—Where the provisions of the Civil Service Retirement Act have been complied with and the rights of the plaintiff have been fully exercised, it is held that his reduction in grade and retirement were matters solely within the discretion of the authorized administrative officers.

Same.—The cases of *Spanhake* v. *U. S.*, 55 C. Cls. 70; *Humphrey's*, 295 U. S. 602, and *Wickersham*, 201 U. S. 390, are differentiated.

Same.—Courts are not for the purpose of passing on the competency of employes in the Government service.

Same; laches.—Delay of more than three years from the time plaintiff was retired in filing petition constitutes laches.

The Reporter's statement of the case:

Mr. George R. Shields for the plaintiff. *King & King* were on the briefs.

Mr. Paul A. Sweeney, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the plaintiff. *Mr. Henry A. Julicher* was on the brief.

The court made special findings of fact as follows:

1. As the result of a civil service examination plaintiff was appointed a substitute clerk in the postal service May 12, 1893, and on September 1, 1893, a regular clerk. Thereafter from time to time he was promoted until on the first of July 1920, he was appointed Superintendent of Registry in the post office at Chicago, Illinois, which position is in the classified civil service, and at that time carried an annual salary of $4,000. On the first of January 1925, his salary as Superintendent of Registry was raised to $4,300.

He was born January 19, 1870.

Reporter's Statement of the Case

2. On July 7, 1933, Assistant Postmaster General Joseph C. O'Mahoney instructed Arthur C. Lueder, Postmaster at Chicago, to make a survey of the personnel of the Chicago post office, making a list of all employees who had attained at least 30 years of service, placing them in three groups, as follows:

Group 1. Those who signified a willingness to accept retirement.
Group 2. Those recommended for separation by reason of inefficiency.
Group 3. Those recommended for retention in the service.

The instructions also required the postmaster to retain the list until it was called for by a post office inspector, who would confer with him. Attached to the letter of instructions was a form, which Postmaster Lueder completed August 10, 1933, as follows:

After a careful analysis of the post office requirements under present conditions, I certify that the following information is correct.

	Clerks	Carriers	Laborers
(1) Number of authorized positions effective date of this report[1]	5,890	3,054	848
(2) Based on present conditions indicate number of regular employees required for proper service. (Suggested new quota)	[1] 5,600	2,838	842
(3) Number of employees regarded as surplus effective date of this report	[1] 290	212	6
(4) Number of existing vacancies not officially taken up effective date of this report	19	12	13
(5) Total number of employees having 30 years of service on June 30, 1933 (1 substitute clerk not included)	638	258	3
(a) Number of such employees who are willing to retire in connection with a reduction in force	100	73	3
(b) Number of such employees who should be retired on account of not being able to perform full service	33	31	----------
(c) Number of such employees recommended for retention (1 substitute clerk not included)	505	154	----------

[1] (Clerks.) See letter addressed to First Assistant Postmaster General under date of July 28, 1933.

In the preparation of this list there was presented to plaintiff a form which if he desired he might sign. The material part of this form read:

To the Postmaster:

In view of the provisions of Section 8 (a) of the Independent Offices Appropriation Act, 1934, providing

for an annuity for any employee of the Government having not less than thirty years of service who is involuntarily separated from the service prior to July 1, 1935, for reasons other than his own misconduct, I would interpose no objection, in the event of a reduction of force in the above-named post office [viz, the post office at Chicago], to being separated from the service without prejudice.

----------------------------------	--------------
(Signature of employee)	(Date)

Plaintiff did not sign the form and at the end thereof Postmaster Lueder made the following endorsement "Employe not willing to be separated—did not sign form. Efficient. Retention recommended."

The services of Arthur C. Lueder as Postmaster terminated at the close of business August 31, 1933, and Ernest J. Kruetgen immediately succeeded him as acting postmaster.

Soon after his accession to office, Acting Postmaster Kruetgen endorsed on a form identical with that on which Postmaster Lueder had made his favorable endorsement, an unfavorable endorsement, reading as follows:

> Employe not willing to be separated—did not sign form. He is no longer a competent supervisor. Accepts directions from his superiors very reluctantly and does not maintain good discipline in his division. I recommend his retirement.

3. The survey of the Chicago post office was made pursuant to a contemplated reduction of force in that office, there having been a substantial loss of business at that point, due to the depression in business.

This reduction in force was not intended to and did not apply to the office held by the plaintiff, that of Superintendent of Registry. The office of Superintendent of Registry was known as a "key" position, that is, necessary to the organization, with duties that could not be dispensed with.

4. On October 10, 1933, Acting Postmaster Kruetgen notified the plaintiff in writing as follows:

> In view of the existing surplus at this office your retirement from the service will be made effective at close of business October 31, 1933, under the provisions of Section 8 (a) of the Independent Offices Appropriation Act.

You are requested to report at the office of the Personnel Section, Room 362, U. S. Court House, to file formal application for annuity.

Full annual leave for the current fiscal year as well as any unused accumulated annual leave you may have to your credit will be granted prior to October 31, 1933. This matter should be taken up by you with your Division Superintendent.

With assurance of my appreciation of the services rendered by you during your term of employment in the Chicago Post Office.

5. Assistant Postmaster C. P. Scheel, in writing, October 11, 1933, notified plaintiff as follows:

Referring to the attached communication with reference to certain changes in the roster of the Registry Division, please be advised that Mr. Howard W. Shaw, Assistant Superintendent of Registry, has been designated Acting Superintendent during any absence on your part that may occur during the present month.

Kindly confer with him on any matters relating to the conduct of the Registry Division with special reference to such periods of absence on your part as may occur.

6. On October 12, 1933, Acting Postmaster Kruetgen signed the following recommendation addressed to "First Assistant (Division of Post Office Service)": "In accordance with your authorization of the S P D–4, 10–9–33, I recommend the following changes in the force of this office, to take effect October 31, 1933." There followed the proposed changes, included in which was the plaintiff, the change as to him being from Superintendent of Registry to Clerk 5th Grade, with a reduction in salary from $4,300 to $2,100.

This recommendation was approved by First Assistant Postmaster General Joseph C. O'Mahoney, October 31, 1933.

Plaintiff was demoted from Superintendent of Registry to Clerk, 5th Grade, October 31, 1933, with a nominal reduction in salary from $4,300 to $2,100, and at the same time was retired from the service. He thereupon became and is now, an annuitant under the Civil Service Retirement Act, receiving an annuity based on a nominal salary in service of $2,100 at time of retirement.

7. In the reduction of the force at the Chicago post office there were separations therefrom under section 8 (a) of the Independent Offices Appropriation Act, 1934, in grade and number as follows:

Grade	*Number*
Clerks and special clerks involuntarily separated	170
Supervisors reduced to clerkships and involuntarily separated	44
Supervisors reduced to clerkships and retired on account of age	16
Supervisors reduced to clerkships and optionally retired	13
Laborers involuntarily separated	3
City letter carriers involuntarily separated	171

The court decided that the plaintiff was not entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the court:

Plaintiff brings this action to recover the difference between the salary of the Superintendent of Registry in the Chicago Post Office at $4,300 per annum and retirement pay of $1,200 per annum from November 1, 1933.

The petition was not filed until November 25, 1936, a period of more than three years from the time plaintiff was retired. The delay of such a long period in asserting title to office, unexplained, constitutes laches. See *Arant* v. *Lane*, 249 U. S. 367, 371; *Nicholas* v. *United States*, 55 C. Cls. 188 (affirmed 257 U. S. 71, 76); *Norris* v. *United States*, 257 U. S. 77, 80.

However, on the merits of the claim asserted, plaintiff is not entitled to recover. The facts show that the postmaster, under whom plaintiff was serving at the time of his retirement, reported that he was "no longer a competent supervisor. Accepts directions from his superiors very reluctantly and does not maintain good discipline in his division." He further recommended to the Postmaster General that plaintiff be reduced in rank from Superintendent of Registry to clerk, 5th grade, at a salary of $2,100 per annum. On this recommendation the Postmaster General ordered plaintiff's reduction in grade. After he had been placed in the grade of clerk, he was subject to the provisions of the retirement law, having served over thirty years and having reached the age limit. The Postmaster requested him to sign a voluntary agreement to retire. This he refused to do and, therefore, he was notified in writing that, due to the

surplus of employees in the office, he was involuntarily retired, effective at the close of business October 31, 1933, under Section 8 (a) of the Independent Offices Appropriation Act of June 16, 1933 (48 Stat. 305) which reads as follows:

> SEC. 8 (a) Whenever at any time hereafter prior to July 1, 1935, any employee of the United States or the District of Columbia to whom the Civil Service Retirement Act, approved May 29, 1930 (U. S. C., Supp. VI, title 5, chap. 14), applies, who has an aggregate period of service of at least thirty years computed as prescribed in section 5 of such Act, is involuntarily separated from the service for reasons other than his misconduct, such employee shall be entitled to an annuity computed as provided in section 4 of such Act payable from the civil service retirement and disability fund less a sum equal to 3½ per centum of such annuity: * * *

Plaintiff claims that he was competent to fulfill the duties of the office and that he should not have been removed. Courts are not for the purpose of passing on the competency of employees in the Government service. This is a matter solely within the discretion of the Administrative branch. If the plaintiff has been deprived of his office illegally, then he has a cause of action but, if the rights granted to him by the law have been fully exercised, he has no cause of action and therefore can not recover. Plaintiff was not removed from office, which, under the Civil Service Law, would have given him the right to have charges preferred and an opportunity to answer; he was reduced in grade and under the Civil Service law no charges and answer are required. Footnote 44, under Rule XII, Removals and Reductions, of the Civil Service Act and Rules Statutes, Executive Orders and Regulations, amended to June 30, 1937, states as follows:

> Charges and answer not required in reduction.—While sec. 6 of the act of Aug. 24, 1912 (37 Stat. 555), relating to removals, requires that reasons for reduction in rank or compensation be made a part of the records of the proper department or office, it does not require or grant the privilege of answer by the person who is reduced, and the requirement in the act that the person affected shall upon request be furnished a copy

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of the reasons does not make it necessary to postpone the reduction until such request is complied with (minute of Commission, Mar. 17, 1914).

Plaintiff could have requested copies of the reasons for his reduction but the record does not show that he did so, as provided for in Section 6 of the act of August 24, 1912, 37 Stat. 539, 555, which provides in part as follows:

> SEC. 6. That no person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof; but no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer making the removal; and copies of charges, notice of hearing, answer, reasons for removal, and of the order of removal shall be made a part of the records of the proper department or office, as shall also the reasons for reduction in rank or compensation; and copies of the same shall be furnished to the person affected upon request, and the Civil Service Commission also shall, upon request, be furnished copies of the same: * * *

The plaintiff relies on the *Spanhake case*, 55 C. Cls. 70; *Humphrey's Executor* v. *United States*, 295 U. S. 602 and *United States* v. *Wickersham*, 201 U. S. 390. We do not think that these cases are apposite. In each one of these cases it was held that the plaintiff had been illegally deprived of his office. In the instant case it appears that the provisions of the law have been fully carried out; that the discretion of the authorized officer was exercised as required by law and that plaintiff has not been deprived of any legal right granted to him. It is settled in such cases that action by an executive officer is not subject to revision by the courts. *Keim* v. *United States*, 177 U. S. 290; and *Eberlein* v. *United States*, 257 U. S. 82.

The petition is dismissed. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* and GREEN, *Judge*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

Reporter's Statement of the Case

KLING BROS. & CO., INC., v. THE UNITED STATES

[No. 42082. Decided May 1, 1939. New trial allowed, judgment vacated and withdrawn, and petition dismissed, October 2, 1939]

On the Proofs

Government contract; supplemental agreement.—Where the Government entered into two contracts with plaintiff for army uniforms and subsequently entered into certain agreements, supplemental to the two contracts, providing for the payment of an additional percentage of the net cost to the Government of material furnished by the Government to the extent of certain savings in material to be effected by additional work, special care and skill, it is held that the supplemental contracts were not void, since they expressed a valid consideration of the additional work and special care by plaintiff which was performed and the Government received a real and substantial benefit.

Same.—Held, further, that proof submitted does not support Government's counterclaim that overpayment was made to plaintiff under the valid supplemental contracts.

The Reporter's statement of the case:

Mr. J. Nelson Anderson for the plaintiff. *Mr. Stanley Worth* and *D'Ancona, Pflaum & Kohlsaat*, and *Mr. Harry N. Wyatt* were on the brief.

Mr. Henry A. Julicher, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant.

Plaintiff seeks to recover $1,334.99 with interest. This amount represents the total of two amounts of $334.99 and $1,000 admittedly due plaintiff, payments of which were withheld by the Comptroller General on February 18, 1924, and March 8, 1926, respectively, and applied by that official against an amount of $3,901.41, being a portion of a sum theretofore determined, allowed, and paid to plaintiff by the War Department under certain contracts with the Quartermaster Corps alleged by the Comptroller General to represent an overpayment to plaintiff, on the ground that the supplemental contracts under which the payment of the $3,901.41 had been determined and made were void for lack of consideration.

Plaintiff duly demanded payment of the amounts admittedly due but payment thereof was refused. On behalf

of the defendant a counterclaim has been interposed in which it is contended that the Comptroller General was correct in withholding and offsetting the amount of $1,334.99 due plaintiff against an alleged overpayment of $5,930.96, leaving a balance, which, it is claimed, the defendant is entitled to recover from the plaintiff, of $4,595.97 with interest.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. On December 27, 1923, special disbursing agent William E. Thackrey of the Department of the Interior drew and issued a check upon the Treasurer of the United States, payable to the order of the Treasurer of the United States, for $334.99, the proceeds of which were deposited in the Treasury February 18, 1924.

The purpose of this transaction was to reimburse the defendant herein for a supposed overpayment made by defendant to plaintiff. The sum of $334.99 was otherwise due the plaintiff.

2. March 8, 1926, the Comptroller General of the United States certified due to the plaintiff as refund of income taxes for the fiscal year 1919, Schedule IT–R–15568, certificate of overassessment 855677, the sum of $1,840.24, and directed that the entire amount be paid to the Treasurer of the United States, "in order to make a refund to the United States," as a partial set-off against an alleged balance due the United States of $3,901.41, reducing the balance to $2,061.17. The sum of $1,840.24, so certified, was paid to the treasurer March 23, 1926.

3. Thereafter, October 28, 1926, the Comptroller General stated another settlement, certifying as due the plaintiff $840.24, being a portion of the sum of $1,840.24 theretofore diverted from plaintiff to the Treasurer of the United States, and this amount, $840.24, was paid to the plaintiff by treasurer's check dated November 5, 1926.

4. The effect of the three foregoing transactions has been to withhold from the plaintiff, from sums otherwise due, a total of $1,334.99 for which plaintiff now sues.

The equivalent sum, $1,334.99, against which the set-off was made, was part of a particular payment made in a

greater amount to plaintiff as "bonus for savings" on certain contracts with the Quartermaster Corps, U. S. Army, for the manufacture of clothing, entered into in the year 1917, Nos. 1289 and 1469, and contracts supplemental thereto, copies of which are in evidence and made part hereof by reference.

A counterclaim has been filed by the defendant for the difference between $1,334.99, and the entire payment so made on the contract as "bonus for savings."

5. No proof has been submitted in support of the counterclaim to show that payment to the extent of $1,334.99 to the plaintiff was erroneously made, nor is there proof of overpayment to plaintiff in any greater amount.

The court on May 1, 1939, decided that the plaintiff was entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The amounts making up the total of $1,334.99 sued for by plaintiff admittedly became due and payable to plaintiff on December 27, 1923, and March 8, 1926, respectively, and the only question is whether the defendant has sustained its counterclaim for a total of $5,930.96. Under the facts in this case and the decisions of this court, the counterclaim cannot be sustained. On June 7 and June 27, 1917, the War Department, through the Quartermaster General, entered into two contracts with plaintiff for the manufacture of a certain number of army uniforms and the United States, under such contracts, agreed to furnish plaintiff a certain amount of material for the manufacture of such uniforms. In October 1917 the War Department, through the Quartermaster General, decided that it was to the best interests of the United States to enter into certain agreements with plaintiff supplemental to the two contracts mentioned, requiring of plaintiff additional work and exercise of especial skill and care in the cutting of the cloth called for by the original contracts and furnished by the Government for the manufacture of the number of uniforms specified in the original contracts. These supplemental contracts did not provide or call for payment by the defendant to plaintiff

of any amount for work required to be performed under any requirement of the original contracts for the manufacture of uniforms, but provided that in return for the additional work, special care, and skill to be performed by plaintiff in cutting the material so as to effect a material saving to the United States in uncut yardage in the piece goods called for and furnished by the Government under the original contracts the Government would pay plaintiff, as compensation for such additional work, special care, and skill, an amount equal to 20 per centum of the net cost price to the Government of such Government-owned textile materials to the extent of the savings in uncut yardage in the piece on comparing the quantities actually used in the cutting with the allowances under the original contracts for the purpose listed in certain schedules. The total yardage of material saved by the exercise of the additional work and special care was to remain the property of the United States.

Plaintiff fully performed the original and supplemental contracts in accordance with the terms and conditions thereof and after completion of the contracts and the acceptance of the work it filed with the War Department evidence of the savings effected under and in accordance with the terms of the supplemental contracts. After consideration thereof and after an investigation and audit, the War Department determined and decided that there was due plaintiff the sum of $5,930.96 at the rate specified in the supplemental contracts for the savings in uncut cloth called for and furnished by the Government under the original contracts. That amount was duly allowed and paid to plaintiff June 11, 1919. Thereafter, in 1921, a further examination and audit of the original and supplemental contracts and of plaintiff's books and records was made by the Government which extended over a period of six weeks and the allowance and payment of the amount mentioned for the savings in cloth effected by plaintiff on the supplemental contracts were found to be in all respects correct. The supplemental contracts were not void. They expressed a valid consideration of the additional work and special care by plaintiff which was performed and the Government received a real and substantial benefit in

the savings in cloth which the Government had agreed to furnish under the original contracts which the plaintiff, under such original contracts, was free to use in whole in cutting the uniforms to be manufactured under such contracts. *Cohen, Endel & Co.* v. *United States*, 60 C. Cls. 513; *Jacobson & Sons* v. *United States*, 61 C. Cls. 420; *Burke & James, Inc.* v. *United States*, 63 C. Cls. 36.

The defendant has submitted no competent proof in support of its counterclaim that any overpayment was made to plaintiff under the valid supplemental contracts.

~~Judgment will be entered in favor of plaintiff for $1,334.99 with interest on $334.99 from February 18, 1924, and on $1,000 from March 8, 1926, to March 3, 1933. It is so ordered.~~

WHALEY, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

ORDER

This case comes before the court on defendant's motion for a new trial, in which motion the point is raised for the first time that the petition should be dismissed for the reason that the claim accrued more than six years prior to the filing of the petition in the Court of Claims; and it appearing from the special findings of fact filed herein May 1, 1939, that the claim accrued in part on December 27, 1923, and in part on March 8, 1926, and that the petition was filed October 24, 1932: IT IS ORDERED, This 2d day of October 1939, that defendant's said motion for a new trial be and the same is allowed; that the judgment heretofore entered in favor of plaintiff be vacated and withdrawn, and that the petition be dismissed.

Judgment is now entered against the plaintiff in favor of the United States for the cost of printing the record in this cause, the amount thereof to be entered by the clerk and collected by him according to law.

IT IS FURTHER ORDERED that the opinion of the court filed herein May 1, 1939, be and the same is modified to show the dismissal of the petition instead of judgment for the plaintiff.

Reporter's Statement of the Case

OUILMETTE CONSTRUCTION AND ENGINEERING COMPANY v. THE UNITED STATES

[No. 43564. Decided May 1, 1939. Defendant's motion for new trial overruled November 6, 1939]

On the Proofs

Government contract; delay by injunction.—Where contractor was delayed in performance of work by court order enjoining both plaintiff and defendant from use of land essential to completion of the project; and where it was not the duty or obligation of the plaintiff but of the defendant, to acquire the land, it is held that the plaintiff is entitled to recover.

The Reporter's statement of the case:

Mr. Robert F. Klepinger for the plaintiff. *Messrs. Fred B. Rhodes* and *Cooper B. Rhodes* were on the briefs.

Mr. Henry A. Julicher, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant.

The court made special findings of fact as follows:

1. Ouilmette Construction and Engineering Company, plaintiff, is a corporation organized under the laws of the State of Delaware, with offices at Chicago, Illinois. Its claim was submitted to the Comptroller General by the War Department, on October 11, 1934, where it was disallowed on June 18, 1935. Upon review, the disallowance was sustained by the Acting Comptroller General on August 7, 1936.

2. On November 19, 1932, plaintiff entered into a written contract with the War Department, for the construction of Lock No. 4 in the Mississippi River, at Alma, Wisconsin. Instructions were received to proceed with the work on December 20, 1932. The contract was performed by the plaintiff within the period as extended, and the contract price has been paid to plaintiff. The contract, together with specifications, is of record as plaintiff's exhibit 1 and is by reference made a part of this finding.

3. The invitation for bids contained the following:

> *Investigation of Conditions.*—Samples of borings taken at the lock site are on hand at the U. S. Engineer Office, 615 Commerce Bldg., St. Paul, Minn., where they

should be inspected by prospective bidders. It is expected that bidders will visit the site and acquaint themselves with all available information concerning the nature of the materials that will be encountered in the river bed, the depths to which it may be necessary to excavate in order to secure satisfactory foundations, the possibility that the river bed or banks will change from natural causes prior to or after commencement of the work, and the local conditions having a bearing on transportation facilities and handling and storage of materials. Failure to acquaint himself with all available information concerning these conditions will not relieve the successful bidder of assuming all responsibility for improperly estimating the difficulties entering into and costs of performing the complete work as required.

4. The contract and accompanying specifications contained the following:

ARTICLE 10. *Permits and care of work.*—The contractor shall, without additional expense to the Government, obtain all required licenses and permits and be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work, and shall be responsible for the proper care and protection of all materials delivered and work performed until completion and final acceptance.

Specifications 2 (c): The United States now owns the land on Main Street marked "Land now owned by the United States" on sheet 10/2. The United States is now in the process of acquiring certain of the lands riverward of the railroad tracks approximately outlined on sheet 10/2. It is expected that the acquisition will be completed not later than December 1, 1932. It is possible, however, that this land may not be acquired during the contract period, in which event the contractor will be solely responsible for obtaining any land in addition to that now owned by the United States which he considers necessary for construction purposes and/or the delivery and storage of materials. All land below the elevation of ordinary high water (estimated to be Elev. *662*) is held subservient to the control of the United States for navigation and may be utilized by the contractor as an agent of the United States.

5. On October 20, 1932, the bids were opened. A few days thereafter the Division Engineer for the Upper Mississippi

River Valley informed plaintiff's president that he was recommending award of the contract to plaintiff. Plaintiff at once ordered its equipment, and operations were begun on December 19, 1932.

Previous to entering into the contract with defendant, plaintiff entered into a verbal agreement with the Chicago, Burlington & Quincy Railroad Company, whose tracks ran along the river past the lock site, for use of railroad property at the site of the work.

6. A narrow strip of land extending 2,300 feet along the east bank of the Mississippi River at Alma, Wisconsin, contained 1.6 acres, and was located adjacent to the lock site. This strip of land was owned by the Chicago, Burlington & Quincy Railroad Company, and is the property referred to in the hereinbefore quoted paragraph of the specifications.

On August 9, 1932, the United States instituted proceedings in condemnation for the acquisition of this property. Plaintiff knew of these proceedings. The United States in the petition alleged that the land was necessary for the construction, maintenance, and operation of locks and dams, and that certain and adequate appropriations and provisions of ample funds for compensation for the lands sought to be taken had been made. On July 21, 1932, the Secretary of War requested the Attorney General to undertake such proceedings, funds being available for paying the award.

7. The railroad company's right-of-way and tracks ran parallel along the entire length of this strip of land. Government drawings accompanying the contract indicated that certain of the east-west streets of the City of Alma extended over the railroad tracks and right-of-way, as public thoroughfares, to the water's edge. Plaintiff's president, having been furnished the drawings, visited the lock site prior to submitting its bid, and discovered that these streets did not cross the tracks; and that there was but one public crossing which was located north of the railroad company's depot and above this tract of land. It was the only planked crossing, and plaintiff at that time anticipated planking other crossings shown on the drawing, and subsequently did so. These streets had never been officially condemned across the right-of-way of the railroad. Defendant gave plaintiff the use of

the buildings owned by the Government as an office for itself, and it was also used as defendant's engineering office for inspection employees. These buildings were located east of the railroad's right-of-way.

Certain plats of the City of Alma, prepared in 1856 and 1877, show that lots lying riverward of Main Street then had a depth of between 80 to 93 feet to the water's edge. The plats also indicate a dedication to public use to a point which at the present time is actually short of the railroad company's right-of-way. The United States District Court, by its injunction, on application of the railroad company prohibited their use both by plaintiff and the Government.

8. As soon as plaintiff began work, it sought permission of the railroad company to use the 1.6 acres as a means of access to the lock site. Plaintiff's president was advised against such use while the condemnation proceedings were pending, and was informed by a representative of the railroad company that he expected the United States would, on December 17, 1932, deposit adequate compensation with the United States District Court for the Western District of Wisconsin to acquire possession of the land; and he was further given to understand that same would be pursuant to a previous agreement between the railroad company and the Government Engineer.

Thereupon plaintiff made arrangements with the railroad company, with no cost to plaintiff for the use of the railroad property, excepting the 1.6 acres, and proceeded to unload its equipment on both sides of the tracks opposite the depot, upstream from the operations. Steel sheet piling was unloaded opposite the station and dragged on ice to the site. Plaintiff fenced and staked off the 1.6 acres in order to insure against trespass.

9. On December 17, 1932, the United States District Court denied defendant's request for immediate possession of the property because of its failure to deposit with the court $110,000 to protect the railroad company against damage that might result from the construction of the lock. The court granted that part of the petition in condemnation which asked for the order of condemnation and the appointment of a commissioner, but did not give possession of the

site to the Government unless the United States deposited this sum to the registry of the court.

Attorneys for the railroad company notified plaintiff they intended to seek an injunction to restrain the Government from further prosecution of the work until the money was deposited. The United States did not deposit the sum, and the railroad company on January 14, 1933, secured an injunction restraining the defendant, its officers, and employees, and the plaintiff and its employees from trespassing on the land in question upon all the railroad property. The injunction applied to the land of the railroad company extending for miles along the Mississippi River, including all crossings, and, except as to the 1.6 acres, remained in effect until plaintiff's contract was completed.

10. The order for preliminary injunction is as follows:

> This cause coming on to be heard on this day upon the motion of plaintiff for a preliminary injunction herein on the sworn supplemental bill of complaint herein, and on due notice to defendants; and the matter having been argued by counsel, thereupon, upon consideration thereof, it is ordered, adjudged, and decreed as follows:
>
> 1. Defendants, and each of them, and their agents, attorney, contractors, and all persons acting under their direction, are hereby temporarily restrained and enjoined, pending the hearing of this cause and until the final order of the court, from each and all of the following acts, and from any act or thing in furtherance of any of the following acts: First, from taking possession, occupying, using, or trespassing upon the property of the plaintiff sought to be condemned in suit No. 3683 At Law, now pending in this court, and described therein as follows:
>
> All those portions of government Lots 2, 3, and 4, section 2, township 21 north, range 13 west of the 4th principal meridian, bounded and described as follows: Beginning at a point on the north line of Orange Street in the city of Alma, Wisconsin, where a line 33 feet distant and riverward of the center line between the two main tracks of the Chicago, Burlington & Quincy Railroad, as now located and operated, intersects the north line of said Orange Street; thence northwesterly along a line 33 feet riverward of and parallel to the center line of the two main tracks of the said railroad 2,300 feet; thence southwesterly at right angles to the center

line of said railroad, to the shore line of the Mississippi River; thence southeasterly along the shore line of the Mississippi River to its intersection with the north line of Orange Street; thence northeasterly along the north line of Orange Street to the point of beginning, containing 1.60 acres, more or less until defendants have perfected the right to take possession thereof by an order of court or by final judgment in said suit; and, second: from trespassing upon, or unlawfully occupying or using, any of the railroad tracks, right-of-way, or adjacent property of plaintiff at Alma, Wisconsin.

Let a writ issue accordingly.

F. A. GEIGER,
U. S. District Judge.

Dated January 14, 1933.

11. On January 16, 1933, the District Engineer directed plaintiff to cease all operations under the contract, which would in any way violate the terms of the injunction, enclosing a copy of the court's order. Plaintiff immediately shut down the job. On January 26, 1933, the District Engineer delivered to the Clerk of the United States District Court, Madison, Wisconsin, the sum of $110,000, as security for the payment of any compensation that might be awarded in the condemnation proceedings. The entire amount of the award was subsequently paid to the Chicago, Burlington & Quincy Railroad Company. On January 25, 1933, the District Judge issued an order granting immediate possession of the 1.6 acres, conditioned on such deposit being made. A copy of this order was transmitted to plaintiff on January 28, 1933, with instructions from the District Engineer to resume work without delay, admonishing him to be careful not to violate those provisions of the injunction not yet dissolved.

12. In 1856 the streets and alleys of the City of Alma were plotted and opened for public use. Main Street and Second Street were plotted and dedicated running parallel to the Mississippi River, and the cross streets, Walnut, Hickory, Myrtle, Vine, Cedar, Elm, Orange, and Pine, were plotted and dedicated to the river. In 1884 the City of Alma granted permission by city ordinance to the C. B. & Q. Railroad Company to build its tracks parallel and on the banks of the river, through the city, and across the various streets

ending diagonally at the river bank. In 1902 the railroad company was granted permission by the City of Alma to fill in the trestle bridges in the City of Alma, but was required to construct and maintain convenient grade crossings over the tracks and fire approaches for the purpose of securing water from the river. In 1913 the C. B. & Q. Railroad Company was relieved from maintaining fire approaches, but no vacation is indicated relieving the railroad company from maintaining convenient grade crossings over its tracks.

In 1877 the owner of certain property abutting on the river in the Village of Alma, through which Vine Street now passes, agreed and consented to the surveying and plotting of same, and declared the extension of Vine Street from Main Street to the Mississippi River dedicated to public use as a common highway. In vacating a street or any part thereof, the City of Alma describes that street, or part of street, to be vacated by metes and bounds, and by city ordinance orders the vacation.

13. Since the court order for immediate possession affected only such land as was referred to in the contract specifications, the railroad company required a formal contract with plaintiff for the use of its property, in order to avoid trespasses prohibited by the injunction. On February 3, 1933, the injunction, so far as it affected the 1.6 acres, was dissolved. A lease was then entered into which permitted plaintiff and defendant's engineers, inspectors, and other employees, to cross and use railroad property other than the condemned strip. Without such arrangement both plaintiff and defendant would have been compelled to proceed to a public crossing approximately 1½ miles north of Alma, and return by boat to the lock site.

Plaintiff was required to, and did, suspend operations from January 14 to January 27, 1933, both inclusive. Plaintiff had acquired the right to use additional land, pursuant to the provisions of paragraph 2 (c) of the specifications, and could have continued to use such land but for the operation of the injunction. During the pendency of the injunction, plaintiff could not continue work from the water side without trespassing on railroad property, in violation of the court's order. To do so would have necessitated revision of the contractor's plans and the moving of machinery and

heavy equipment to the crossing 1½ miles above the site and return.

14. The defendant could have deposited the $110,000 in question with the Federal Court on December 17, 1932.

On July 16, 1934, the District Engineer wrote a letter to the Chief of Engineers, U. S. Army, Washington, D. C., which is of record as plaintiff's exhibit 16, pp. 44–46, and is by reference made a part hereof. The concluding three paragraphs of this communication read as follows:

> 4. It is, therefore, the contention of this contractor that the situation in which he was placed, and to which his extra costs were due, resulted from the act of the Government in delaying to comply with the requirement of the Court to deposit $110,000 as a condition precedent to granting the immediate possession sought by the Government. In this I believe he is correct. It seems quite clear to me that this contractor was proceeding with the work in good faith and that he became the victim, to the extent of delay and extra costs, of a legal engagement between the Government and the railroad. Whether this imposes a legal liability on the United States to reimburse him for the additional costs, is a matter which I cannot decide, although it has been and still is my opinion that the provisions of paragraph 2 (c) of the specifications under which the job was bid required the contractor to provide for carrying on the work in the event the United States failed to acquire the land in question.
>
> 5. The details of the amount of the contractor's claim are outlined in more detail in his letter of July 10th, inclosure No. 1 hereto. They appear to be reasonable actual costs.
>
> 6. In view of my opinion cited in paragraph 4 above, I cannot recommend that any part of the contractor's claim for extra compensation be allowed.

The Chief of Engineers forwarded similar findings to the Secretary of War, which are of record as plaintiff's exhibit 16, pages 48–50, and are by reference hereby made a part of this finding. The concluding paragraph reads as follows:

> 7. While there is no legal basis for an allowance of the claim, it is deserving of equitable consideration. The contractor did proceed in good faith; he made an arrangement with the railroad company for the right to use the additional ground needed, and the loss claimed

was actually incurred, due to the delay caused by the injunction which issued solely because of the action of the Government in delaying the deposit of collateral required by the Court. Because of this aspect of the case, I have prepared for your signature the inclosed draft of letter to Mr. W. B. Ewer, President of the Ouilmette Construction & Engineering Company, advising him of the findings contained in this letter and further that if he so desires, the claim will be referred to the General Accounting Office for settlement on the equities involved.

15. The amount of damages sustained by plaintiff is shown in the itemized account below. According to the evidence, plaintiff incurred damages as follows:

Equipment Rental during shutdown period, January 16, 1933, to January 27, 1933, inclusive	$2, 510. 00
Cost of maintaining job personnel during shutdown period including Workmen's Compensation and Liability Insurance	1, 727. 61
Cost of protection of equipment during shutdown period	308. 90
Cost of building earth dike, upper guide wall area (dike useless after shutdown)	252. 50
Pumping upper guide wall area	230. 40
Cutting and breaking ice subsequent to resumption of work, January 27, 1933	135. 00
Additional costs of timber cribbing in ice and water	350. 00
Cost of insurance policy protecting Railroad Company	227. 62
Cost of watchmen service paid to Railroad Company from January 27, 1933, to completion of work	2, 409. 03
Cost of special signal system	348. 83
Labor and material—barbed-wire fence and special crossing protection	524. 19
Traveling expenses to court hearings	144. 67
Legal fees and expenses	783. 04
Workmen's Compensation and Public Liability insurance	219. 81
	10, 171. 60

The court decided that the plaintiff was entitled to recover.

BOOTH, *Chief Justice*, delivered the opinion of the court:

This case is similar to the case of *Gillen Co.* v. *United States*, 88 C. Cls. 347. The one issue involved is determinable as one of law from facts which do not admit of serious dispute. The defendant accepted plaintiff's bid to furnish all the materials and labor necessary to construct Lock No. 4 in the Mississippi River at Alma, Wisconsin. The plaintiff is a Delaware corporation and possessed the equipment essential for the contract work.

Specification 2 (c) contained the provisions set forth in Finding 4. From this specification the contractor learned that the defendant did not own certain land "riverward of the railroad tracks" of the Chicago, Burlington & Quincy Railroad. Notice was also given that the defendant had commenced condemnation proceedings against the railroad to take over the land and expected to complete its acquisition by December 1, 1932.

Plaintiff was ordered to commence work on December 19, 1932, and complied therewith. On January 16, 1933, the plaintiff was officially ordered to cease all work under the contract that would constitute the violation of an injunction obtained by the railroad against the defendant and the plaintiff, as narrated in Finding 10, and it was not until January 27, 1933, that plaintiff was enabled to resume performance of the contract work. This suit is for the recovery of a judgment for losses sustained by plaintiff from January 16, 1933, to January 28, 1933.

The defendant contests the right of plaintiff to a judgment upon three grounds. It is argued that the facts in the record disclose that plaintiff's case is predicated upon a delay caused by the railroad company in withdrawing from plaintiff the right to use its property which the company previously by oral agreement had granted, an agreement which did not extend to the use of 1.6 acres of company land.

The withdrawal of the oral agreement mentioned was not the vital factor in the transaction. Title to the 1.6 acres of railroad land by the defendant was essential, and the withdrawal by the railroad from the agreement with the plaintiff might have assumed importance had not the railroad at the same time enjoined the defendant from entering upon or utilizing the 1.6 acres of its land. The 1.6 acres of land was a narrow strip extending for 2,300 feet along the river and directly adjacent to the lock, and its importance to the project is evidenced by the defendant's court proceeding to condemn. Obviously it was not the duty or obligation of the plaintiff to obtain the land; the authority under the law to acquire it was vested in the defendant.

Defendant's second contention is that the defendant was under no obligation to furnish plaintiff access to land it did

not own, and therefore the time consumed in getting title to the 1.6 acres was not the proximate cause of the delay. In other words, the acquisition of the 1.6 acres was not of vital importance to the plaintiff in performing work under the contract. The record disposes of this defense. The order for preliminary injunction we set forth at defendant's request. Manifestly it forbade entering upon any lands of the railroad company and the lands involved ran parallel to the 2,300 feet of land or the 1.6 acres. It was impossible to reach the same without crossing the company's tracks.

Irrespective of defendant's title to other lands or the obligation of the plaintiff to obtain additional lands for storage and operative purposes, the injunction tied up the entire enterprise, suspended work for the time being, and rendered the plaintiff helpless to proceed in an orderly manner to complete the work. The officials in charge of the work do not traverse this holding.

We do not deem it necessary to discuss the disputed question as to whether ordinances of the city of Alma did as a matter of law confer upon the city the right to cross the railroad tracks at certain points of public streets running east and west from the river bank. It is extremely doubtful if any of the ordinances or the contended-for dedication plats accomplished this purpose. It is sufficient to say that no public crossing was available to the plaintiff at any point opposite the 1.6 acres within any reasonable distance of the site of the work.

The extent of the loss suffered by the plaintiff is not disputed. All the competent evidence in the record sustains the items of the claim. We think the plaintiff is entitled to a judgment for $10,171.60 under the rule established by the following cases: *Phoenix Bridge Co.* v. *United States*, 85 C. Cls. 603; *Karno-Smith Co.* v. *United States*, 84 C. Cls. 110; *Samuel Plato* v. *United States*, 86 C. Cls. 665; *McCloskey case*, 66 C. Cls. 105.

Judgment for plaintiff in the sum of $10,171.60. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and GREEN, *Judge*, concur.

WILLIAM T. JOPLIN AND C. JACKSON ELDON, COPARTNERS, TRADING AS JOPLIN AND ELDON, v. THE UNITED STATES

[No. 43166. Decided June 19, 1939. Supplemental opinion on defendant's motion to dismiss and for a new trial December 4, 1939]

On the Proofs

Government contracts; breach by Government; exhaustion of funds.—Where contractor, having complied with the terms of the contract and having carried the work to a point where it would have been possible to complete it within the time limit, was notified that the funds appropriated for the purpose were exhausted and work would have to be suspended, and work was accordingly suspended, it is held that this constituted a breach of the contract on the part of the Government.

Same.—The general rule is that persons contracting with the Government to perform work under general appropriations are not bound to know the condition of the appropriation account of the Treasury or the contract book of the department. *Schuyler & McDonald* v. *U. S.*, 85 C. Cls. 631; *Myerle* v. *U. S.*, 31 C. Cls. 105, cited.

Same.—Where the Government fails to carry out its part of the contract, the contractor, having suffered damage as a result thereof, is entitled to recover the amount of damages proved.

Same.—Where the advertisement for bids stated that the Secretary had "programmed" a certain amount for the work on the project, of which only a stated percentage was "cash immediately available," and the balance was "funds authorized against which contractual obligations can be incurred," it is held that the plaintiffs had the right to expect that the Secretary's program would conform to the provisions of written contracts made, which had been duly authorized by statute.

Same; accrual of claim.—Where alleged breach of contract occurred more than six years prior to the time when the suit was commenced, but less than six years elapsed between the time when the contract was completed and the suit begun, it is held that the suit was timely. *Myerle* v. *U. S.*, 31 C. Cls. 105, cited.

Same.—The contractor is not obliged to sue on each item of damage as it arises and his claim in full does not accrue until the completion of the contract, if the contract is completed.

The Reporter's statement of the case:

Messrs. Paul B. Cromelin and *Lowry N. Coe* for the plaintiffs.

Mr. Grover C. Sherrod, with whom was *Mr. Assistant Attorney General Sam E. Whitaker*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiffs are copartners doing business under the name of Joplin & Eldon. Prior to 1926 each of them had had some twenty years' experience in road construction work, a substantial part of which had been in mountainous territory in the States of Oregon and Washington and in terrain substantially similar to that involved in the contract hereinafter referred to.

2. Shortly prior to June 29, 1926, the United States Bureau of Public Roads advertised for bids for the construction of the West Side Highway, Round Pass Section, Mt. Rainier National Park. The advertisement gave the following information with respect to the work to be performed:

> The length of project to be constructed or improved is approximately 9.0 miles, and the principal items of work are approximately as follows:

Clearing	65 Ac.
Grubbing	39 "
Excavation, unclassified	317,000 Cu. Yds.
" structures	3,200 " "
Overhaul	30,000 Sta. Yds.
Crushed rock surfacing	24,800 Cu. Yds.
Pipe culverts	3,940 Lin. Ft.
Class A Concrete	80 Cu. Yds.

> The work embraced in this contract shall be completed by July 1, 1928.

The advertisement also stated that—

> The Secretary has programmed $429,500.00 for the work on this project, $64,000.00 of which is cash immediately available and $365,500 is funds authorized against which contractual obligations can be incurred. In case the contract awarded for this work shall leave available any portion of the funds so programmed, the right is reserved to extend this contract to such extent as will absorb the funds so remaining available, either by increasing quantities of work to be performed or by increasing the length of the project beyond the termini shown on the plans: Provided, That no such extension shall be made which will exceed in amount 25 percent of the original amount of this contract. The Secretary also reserves the right to shorten the project if necessary to keep the cost of the work within the above funds.

3. Pursuant to the advertisement for bids plaintiffs on June 29, 1926, submitted a proposal for performing the work at certain unit prices, the total of which, based upon the approximate quantities set out in the advertisement, amounted to $306,094. However, the quantities given were approximations and were subject to be increased or decreased in accordance with defendant's specifications. July 9, 1926, plaintiffs were notified by defendant that their proposal had been accepted, and on July 19, 1926, a contract was entered into between plaintiffs and defendant which provided for carrying out the contract in accordance with the proposal of defendant. The proposal, plaintiffs' bid, the contract and specifications are in evidence as plaintiffs' Exhibits 1 and 1A, and they are incorporated herein by reference. Under the terms of the contract plaintiffs were required to furnish all material and equipment and to perform all work in the carrying out of the project. It was provided that the work was to be completed by July 1, 1928. The contract was approved by the Secretary of the Interior August 18, 1926, and plaintiffs were notified about August 23, 1926, that such approval had been had.

In accordance with the terms of the contract defendant on September 27, 1926, increased the work to be performed by an amount not to exceed 25 percent, and as a result of such increase extended the completion date from July 1, 1928, to January 1, 1929. The additional work provided for the construction of the road at an increased width over that originally proposed.

4. Upon the execution of the contract and appropriate notice from defendant plaintiffs duly entered upon the performance of the work in August 1926, and likewise upon the receipt of the foregoing notification of an increase in the work, duly proceeded with its performance.

5. The project contemplated the construction of a pioneer highway for a distance of nine miles up and through an extremely rough section of Mt. Rainier National Park. The road for 7½ miles extended generally upward from an altitude of approximately 2,000 feet to an altitude of approximately 4,000 feet and then downward 1½ miles. In places the grade was so steep that it was necessary to

proceed by a series of loops around the high elevations. That section of the park was generally heavily wooded and the undergrowth was very thick. Some of the trees were as much as eight and ten feet in diameter and 200 feet in height. The soil consisted largely of pumice stone, sand, and boulders, with a small amount of solid rock ledges.

6. The work under the contract consisted of three major classifications: First, clearing and grubbing; second, excavating, and third, surfacing. The clearing consisted of the removal of underbrush, felling of trees, trimming and bucking and decking and burning. This operation was followed by the blasting and burning of stumps and generally cleaning up after this operation. The excavating which was the major item in the contract and constituted more than 50 percent of the work to be performed consisted of digging, excavating, and grading the roadway in proper condition for the placing of a crushed stone surface thereon. The final classification, surfacing, consisted of placing a bottom course of crushed rock on the road and then following with a lighter top course of crushed rock. With the necessary material, equipment, and facilities available, and under proper conditions, the surfacing could have been completed very rapidly after the other work had been performed.

7. Plaintiffs entered upon the performance of the contract in August, 1926, and, preliminary to the beginning of work called for by the contract, proceeded with the construction of camps, the transportation of supplies and equipment to the site and other preparatory work. The first actual work done was clearing, grubbing, and burning, and that, with a small amount of excavation, constituted the principal work done during 1926. Because of the preliminary work necessary and the fact that progress, by the very nature of conditions, was normally slower in the first classification of work to be performed, work of a value of only approximately $10,000 was done in 1926.

8. More progress was shown during 1927 when clearing, grubbing, and excavating work, together with minor items, was being done. By the end of that year work of a value of approximately $101,000 had been completed. This was substantially less than should have been accomplished in

the time which had elapsed in order to carry out the contract by the completion date then fixed of January 1, 1929, and based upon the total amount of the contract when finally completed of $355,682.74, as well as upon the amount as originally contemplated and shortly thereafter increased.

9. As a result of the progress which was being made in 1926 and 1927 defendant's representatives became apprehensive as early as September, 1927, that the work would not be completed on time and urged that it be expedited. In January, 1928, plaintiffs held a conference with defendant's representatives, at the latter's request, with the view of ascertaining plaintiffs' proposed plan of operation for the 1928 season, expediting the work and determining whether it could be completed on time. Following that conference plaintiffs submitted a plan of operation on January 12, 1928, in which they indicated how they expected to complete the various phases of the work during 1928. Upon receipt and examination of that plan or schedule defendant's representatives replied on January 16, 1928, pointing out various things that had to be done and stating that "If the schedule submitted is maintained we see no reason why you will not complete."

10. With the beginning of the construction season in 1928 plaintiffs expedited their work in many ways, using a double shift on some operations and generally showing substantial improvement in their rate of progress. By about October 8, 1928, clearing and grubbing, except in minor particulars of removing debris, had been 100 percent completed, excavating approximately 90 percent completed, subgrade 80 percent completed, base course of sufacing 50 percent completed, and top surfacing 17 percent completed. By October 20, 1928, the total value of work completed, practically all of which was done prior to October 1, 1928, for reasons which will hereinafter appear, was $237,633.44. With the progress which had been made and was being made at and shortly prior to October 1, 1928, and with the organization, equipment, and facilities available at that time and with weather conditions continuing as they did in 1928, it would have been possible for plaintiffs to complete all the work provided by the contract, with minor exceptions,

before January 1, 1929, if the work had not been suspended on or about October 8, 1928.

11. During 1928 work under existing contracts of the defendant for road building progressed more rapidly and required a greater expenditure of funds than had been anticipated by the defendant, with the result that by the latter part of September 1928, it became known to defendant that funds for road-building purposes of the character being carried on by plaintiffs were practically exhausted. Accordingly, on October 1, 1928, defendant advised its representative who was in charge of plaintiffs' work as follows:

> Park service has barely sufficient cash to meet September obligations. Additional cash not available until Congress acts probably January earliest. Order all contractors to shut down. Only alternative is for contractors to finance themselves on basis of certified monthly estimates. Canvass contractors and wire results in each case.

The substance of that telegram came to the attention of plaintiffs shortly after it was delivered to defendant's representatives on October 1, 1928.

12. October 4, 1928, plaintiffs' and defendant's representatives had a conference at which the latter stated to the former the information received through the telegram just referred to and advised plaintiffs that they would have the option of either suspending operations until further funds were appropriated by Congress, which in no case could be expected before January 1929, or accepting certified estimates on work as completed and financing themselves until money should become available through a further appropriation by Congress. Plaintiffs were informed by bankers that certified estimates with an indefinite date of payment, such as proposed by defendant's representatives, were unacceptable as the basis for a loan.

At that conference plaintiffs advised defendant's representatives that they would not undertake to proceed further except for cleaning up odds and ends necessitated by the suspension of work and would shut down operations about October 15, 1928, which decision was carried out. At the same time plaintiffs inquired whether an extension of

time would be granted for the completion of the work and were informed that such an extension would be recommended.

13. October 8, 1928, defendant's representative formally authorized plaintiffs as follows to suspend work:

> On account of the fact that cash is not available to make further monthly payments at present on your contract for the West Side Highway, Round Pass Section, Mt. Rainier National Park project 2–A, you are authorized under the terms of your contract as contained in Form F. R. 50, page 9, paragraph "Temporary Suspension of Work" to close down your construction operations on October 15th, 1928. This office will notify you when such operations should be resumed.

And on October 13, 1928, defendant's representative advised plaintiffs that a recommendation would be made for an extension of time within which to complete the work under the contract, but requested plaintiffs to make formal application for such extension. Plaintiffs complied with that request. An extension was at first granted to September 6, 1929, and a further extension was ultimately allowed to the end that when final settlement was made on account of the completion of the contract on November 20, 1929, no amount was withheld as liquidated damages.

March 8, 1929, plaintiffs were advised by defendant that funds had been made available for the completion of the work, and on April 5, 1929, were advised that work might be resumed as soon as weather conditions would permit. June 17, 1929, plaintiffs were advised by defendant that weather conditions were such that they were authorized to resume construction operations June 21, 1929. Plaintiffs accordingly resumed operations at or about June 21, 1929, and completed the contract November 20, 1929.

14. Upon receipt of information as shown in findings 11 and 12 that cash was no longer available for payment on account of work performed, plaintiffs by or before October 4, 1928, began slowing down operations and did very little work thereafter except such as was necessary to protect work already done, and to perform some work incidental to the cessation of operations. At that time the greater part of plaintiffs' work was being carried on at the higher eleva-

tions, some at an altitude of approximately 4,000 feet, some 7½ miles from where operations began and extending from that point in both directions, that is, down the high elevation on the last 1½ miles of the road, and some on the opposite side approaching the high elevation. In these elevations where the work was being done and where plaintiffs' construction equipment was located the very severe winters, with snow being piled at times to a depth of from 20 to 60 feet, made it necessary for plaintiffs to move their equipment to a lower level where it could be protected during the winter season. The operations were being carried on about 16 miles from the nearest railroad. In order to afford the necessary protection for the equipment plaintiffs built warehouses, camps, and other facilities in the lower levels and moved their equipment and supplies and stored them at those points for the winter season. The cost of moving this equipment, storing and protecting it and carrying out other work incidental thereto was $2,545.54.

During the winter heavy snows caused the storage facilities, which plaintiffs had constructed, to cave in and it became necessary for plaintiffs to send men into the Park on skis and take the necessary steps to protect the supplies and equipment. In addition certain incidental expenses were incurred in drying out damaged supplies and equipment and generally preparing for resuming operations in 1929. The total amount expended for these purposes was $1,235.31.

The record is insufficient to substantiate a finding that the defendant has not paid either in whole or in part two items claimed by plaintiffs, namely, "Expenditures made in picking up branches of trees that had been blown down or fallen across or into the roadbed during the extra winter, $376.54," and "Cost of removing the bank ravellings caused by the snow and frost of the winter, rebuilding fills or embankments that had sloughed off, and resloping and refinishing of the work which had been completed during 1928 and again getting to the front, $5,073.34."

The expenditures referred to in the first and second paragraphs of this finding represent amounts paid out by plaintiffs for which they have not otherwise been compensated. In each instance the amounts shown include a reasonable profit of 15 percent.

15. The principal items of plaintiffs' equipment on the site of operations at the time of the issuance of the suspension order were as follows:

One 75 Lorraine Gas Shovel.
Two Erie Type B Shovels.
One 60 Best Caterpillar tractor with hoist.
One 160-foot Ingersoll Air Compressor.
One 110-foot Sullivan Air Compressor.
Five Jack Hammers.
One 120 H. P. Diesel Engine.
One 15 x 36 Universal Crusher.
One 3-foot Cone Crusher.
Elevators, screens, etc.
Three 5-ton White Trucks.
One 1½-ton Graham Truck.
Two Shops, two Camps, and miscellaneous equipment.

16. As a result of the suspension of work under the contract plaintiffs' equipment enumerated in finding 15 was not in use from about October 15, 1928, to about June 21, 1929, when work was resumed. During a part of that period the demand for such equipment was materially lessened by the winter season in that some construction work of the type for which the equipment was adapted could not be carried on during that time, though some construction work at certain levels and in certain sections for which the equipment was adapted was being carried on throughout the year.

A reasonable rental value of such equipment for the portion of that period when such equipment could reasonably have been rented was $34,500.

17. Among the items included in the schedule of work to be performed and material to be furnished and the price bid therefor by plaintiffs were the following:

Item 15—providing and maintaining water plant or plants on the job, lump-sum price---------------------------- $250.00
Item 16—900,000 gallons (approximate quantity estimated) watering at $3.00 per one thousand gallons-------------- 2,700.00

Defendant's specifications contained the following provision:

Watering.—During compaction water shall be applied as the engineer shall direct. The normal amount, unless

otherwise directed, shall be a total of 60 gallons per cubic yard of material.

The proposal for bids provided that—

> The right is especially reserved to eliminate entirely some, or to increase or decrease any or all, of the quantities shown in the proposal form * * *.

18. In securing and applying the surfacing material prior to 1929 plaintiffs were using a sort of talus slide that was dry. It was laid on the road without the application of water thereto and produced a surface satisfactory to defendant's representatives. A satisfactory surface was possible without the application of water, because the necessary moisture for compaction was obtained through the climatic conditions which prevailed at the altitude where the road was being built.

However, in 1929, plaintiffs changed to another source of supply for surfacing materials and began to use material from a gravel slide or a gravel wash where the material contained a substantial amount of mud and dirt. In order to facilitate crushing operations and to prepare a surfacing material which would be acceptable to defendant's representatives plaintiffs installed a watering plant at a cost of approximately seven or eight hundred dollars and used that plant during the 1929 season in washing material during the crushing operations. After the material had been crushed it was loaded on the trucks in a generally damp condition and then hauled to the places where it was laid on the road. No additional water was applied to the surfacing material in order to produce a road satisfactory to defendant's representatives and no objection was made by defendant's representatives to the procedure followed by plaintiffs in the preparation of the surfacing materials. During 1929 plaintiffs placed a total of 16,925 cubic yards of surfacing material.

19. December 20, 1929, defendant advised plaintiffs that items 15 and 16 heretofore referred to in finding 17 had been omitted from the contract for the reason that they were unnecessary for the proper completion of the work. Plaintiffs protested such omission and demanded payment of the lump-sum price of $250 bid for providing a watering plant

and $3,046.50 for water used in connection with surfacing operations in 1929. Neither the construction of the water plant nor the application of water as carried out by plaintiffs was done at the direction of defendant's representatives and the record is insufficient to show that the application of water as performed by plaintiffs was necessary to secure compaction within the requirements of defendant's specifications.

20. At the time plaintiffs' work was suspended in October 1928, as heretofore shown, plaintiffs made no protest or claim for damages which were sustained as a result of such suspension of work. However, on September 28 and October 4, 1929, plaintiffs made protest and claim on account of such suspension, and when no allowance was made in the final vouchers as submitted on account of the completion of the contract on November 20, 1929, plaintiffs filed a claim with the Comptroller General on December 1, 1931, setting out in detail the various items which are made the basis of this suit with respect to damages sustained on account of suspension of work by the defendant. That claim was disallowed and no payments have been made on account thereof.

The court decided that the plaintiffs were entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

Notwithstanding the case has been tried and submitted on the facts, the defendant has filed a motion to dismiss the petition on the ground that it is based upon an alleged breach of the contract occurring more than six years prior to the time when the action was commenced.

While the petition does allege that in several respects the defendant failed to comply with the contract and that these specific failures occurred more than six years prior to the time when the suit was commenced, less than six years elapsed between the time when the contract was completed and this suit was begun. If the contention of defendant that plaintiffs' right of action accrued at the time when the defendant, in the course of work upon the contract, failed

to comply with its provisions is sustained, then, as said in *Myerle* v. *United States*, 31 C. Cls. 105—

> * * * any contractor with the Government must, to protect his right, sue upon every item of difference of fact and every item of difference of interpretation of the contract as each detail of his work is undertaken or completed, as the case may be.

And on every occasion when the Government fails to act in accordance with the contract, the contractor must "forthwith begin the prosecution of his remedy against the Government."

The holding in the case last cited was adverse to this rule. We think the contractor is not obliged to sue on each item of damage as it arises and that his claim in full does not accrue until the completion of the work called for in the contract, if the contract is completed.

The motion to dismiss must be overruled and the case determined upon the facts and the law applicable thereto.

This action is brought upon an alleged breach of a contract entered into between the plaintiffs and the United States in July 1926. The contract provided for the construction of a pioneer highway for a distance of nine miles up and through an extremely rough section of Mt. Rainier National Park. The work required included clearing, grubbing, excavating, and surfacing, the excavating being the major item of the contract. Plaintiffs entered upon the performance of the contract in August 1926. So much preliminary work was necessary that of the work to be performed under the contract only about $10,000 in value was done in 1926. In 1927, work of the value of $101,000 was completed. This was less than should have been accomplished in the time which had elapsed in order to complete the work within the time originally fixed. In the latter part of 1927, defendant's representatives became apprehensive that the work would not be completed on time and urged that it be expedited, and in January 1928 plaintiffs held a conference with defendant's representatives following which plaintiffs submitted a plan of operation on January 12 which was considered sufficient by defendant's representatives if maintained. Thereafter the plaintiffs ex-

pedited the work in many ways and the total value of work completed by October 20 was $237,633.44. At this rate it would have been possible for the plaintiffs to complete all the work provided by the contract, with minor exceptions, before January 1, 1929, if the work had not been suspended on or about October 8, 1928.

During 1928 work under existing contracts of the defendant for road building progressed more rapidly and required a greater expenditure of funds than had been anticipated by the defendant with the result that by the latter part of September 1928 it became known to defendant that funds for road building purposes of the character being carried on by plaintiffs were practically exhausted. Accordingly, on October 1, 1928, the defendant advised its representatives in charge of the work to be done by plaintiffs and others that—

> Park service has barely sufficient cash to meet September obligations. Additional cash not available until Congress acts probably January earliest. Order all contractors to shut down. Only alternative is for contractors to finance themselves on basis of certified monthly estimates. Canvass contractors and wire results in each case.

October 4, 1928, plaintiffs' and defendant's representatives had a conference in which the plaintiffs were told that they would have the option of either suspending operations until further funds were appropriated by Congress or accepting certified estimates on the work as completed and financing themselves until a further appropriation was made. Thereupon the plaintiffs advised defendant's representatives they would not undertake further work except for cleaning up odds and ends and would shut down operations about October 15, 1928, which decision was carried out. October 8, 1928, defendant's representative formally authorized the plaintiffs to suspend work. Subsequently by several extensions additional time was allowed for the completion of the contract so that when it was finished on November 20, 1929, no amount was withheld as liquidated damages. Plaintiffs resumed operations about June 21, 1929, and completed the contract as above stated.

Opinion of the Court

The record in the case is very long and the evidence voluminous but there is little dispute with reference to the facts in the case and only one question of law involved. Counsel for both parties commend the findings of the commissioner of this court, and the exceptions taken by the respective counsel are few in number. After examining the testimony and the documentary evidence offered in the case, we have concluded that no change should be made in the commissioner's findings.

The plaintiffs object specially to that part of Finding 14 which holds the record is insufficient to substantiate plaintiffs' claim that the defendant has not paid in whole or in part for two items of damages set up by plaintiffs relating to expenditures made in removing branches of trees blown down or fallen across or into the roadbed during the "extra" winter, and "cost of removing the bank ravellings caused by the snow and frost of the winter" and related work.

While the evidence is sufficient to show the amount of work and expense incurred by plaintiffs in relation to these two matters, we agree with our commissioner that the evidence fails to show that the plaintiffs have not received payment therefor. The evidence shows that the plaintiffs expended on these items the amount claimed but there is no direct testimony that they have not received payment in the many partial payments made thereafter. The plaintiffs contend that this is shown by the statement of certified monthly estimates offered in evidence, but, in our opinion, these statements are so indefinite that no conclusion can be reached therefrom with reference to this matter.

The defendant especially objects to the finding of the commissioner that the reasonable rental value of plaintiffs' equipment during the period it was not in use by reason of the suspension order was $34,500. It is true that the nature of the claim upon which the allowance was based is such that the amount thereof cannot be estimated exactly but this does not prevent the plaintiffs from recovering under the circumstances of the case. The commissioner found that the amount above stated was the rental value "for the portion of that period when such equipment could reasonably have been rented." Transposing this statement,

it is in effect a finding that the equipment could have been rented for a portion of the period during which it was idle and its reasonable rental value for such period was the value stated in the findings. On behalf of the plaintiffs it is urged that as evidence was produced without contradiction to support the amount of $52,800 claimed, the full amount should have been allowed. But the testimony given was in the nature of opinion evidence which the court was not obliged to accept to its full extent if, on the whole, the circumstances of the case did not warrant it. We think the several amounts given by plaintiffs' witnesses which made up the item were in some respects unreasonably large and that the commissioner correctly determined a reasonable rental allowance from all the evidence.

Counsel for the respective parties agree that the only issue of law is whether the notice by defendant to the plaintiffs to suspend work because of lack of funds with which to continue performance constituted a breach of the contract.

In connection with this question of law, one matter of evidence is argued by the defendant. It relates to the testimony of Joplin, a member of the partnership constituting the plaintiffs. The defendant offered testimony tending to show that Joplin did not make any objection to the suspension of the contract, and it is contended that the failure to produce Joplin in rebuttal of this testimony constituted a presumption against plaintiffs that Joplin, if produced as a witness would be unable to deny the testimony offered by defendant on this point. But the testimony showed that Joplin was ill and unable to attend the trial which is sufficient to rebut the presumption. Moreover, we think that under all the circumstances of the case even if the plaintiffs did fail to make any protest against the order suspending the work this fact would not show acquiescence therein.

The legal issue between plaintiffs and defendant involves the question of whether the plaintiffs were bound to know the condition of the appropriation account of the Treasury.

The general rule is that persons contracting with the Government to perform work under general appropriations are not bound to know the condition of the appropriation

account of the Treasury or the contract book of the department. See *Schuler & McDonald* v. *United States*, 85 C. Cls. 631, 643, and *Myerle* v. *United States*, *supra*. And where the Government had failed to carry out its part of the contract the plaintiff, having suffered damage as a result thereof, is entitled to recover the amount of damages proved. In the case before us it is contended, however, that as the advertisement for bids stated—

> The Secretary has programmed $429,500.00 for the work on this project, $64,000.00 of which is cash immediately available and $365,500 is funds authorized against which contractual obligations can be incurred,

the rule set out above does not apply.

Whatever the Secretary's program may have been, it was subject to change and we think the plaintiffs had the right to expect it would conform to the provisions of written contracts made which had been duly authorized by statute. We have shown in the statement of the case that plaintiffs did not proceed with any undue haste in performing the contract. Only about $10,000 in value was done in 1926, and in 1927 the work amounted to about $101,000, which was less than should have been accomplished in order to complete the work within the time fixed. The result was, as stated in the first part of the opinion, that defendant's representatives urged that it be expedited and the total value of the work completed by October 20, 1928, was $237,633.44 which was much less than the amount authorized against which contractual obligations could be incurred as stated in the call for bids.

The project included in the Joplin and Eldon contract was only a part of a large program of the Government providing for the construction of roads and trails in national parks. No question is raised as to the authority of the Government officials to make the contract under which suit was brought. The defendant contends that the payments under it were only to be made "subject to funds stipulations in notice to contractors," as stated in the contract. The only notice plaintiffs received was that the Secretary, at the time the contract was made, had "programmed" the use of a certain amount of funds. Obviously, however, the Secretary

could change this program at any time and the amount of the appropriations which was under the control of the Secretary could be increased by the action of a subsequent Congress. Before the work had been suspended for want of funds the first session of the Seventieth Congress lasting from December 5, 1927, to May 29, 1928, had convened and adjourned after appropriating several millions of dollars for roads and trails in connection with the national parks. Whether any of this sum could have been used in the discretion of the Secretary on the particular project under consideration, the record does not show. At all events, the plaintiffs had no reason to expect that Congress would adjourn without appropriating the money to finish duly authorized contracts on which large sums had been already expended, especially as plaintiffs had been paid several times the amount of cash named in the so-called program and had been urged to expedite the work in order to complete it according to the contract. Up to the time when notice was received to discontinue the work, the plaintiffs were subject to a heavy penalty in the form of liquidated damages if they failed to complete the work within the period fixed by the contract. The provision making the plaintiffs subject to such damages is inconsistent with the statement in the advertisement for bids upon which defendant relies. Considering all the circumstances of the case, we think the plaintiffs were not bound to keep watch upon the appropriations made by Congress and the program of the Secretary which apportioned the sum so appropriated.

The defendant on October 1, 1928, advised its representative in charge of the work that the park service had barely sufficient cash to meet September obligations and to "order all contractors to shut down," and the attention of the plaintiffs was called to this direction. Thereafter, the plaintiffs were given the option of suspending operations or financing themselves until money should become available through a further appropriation. The plaintiffs then declined to proceed further and were authorized to suspend work. We think under all the evidence this constituted a breach of the contract on the part of the defendant.

The findings show that the plaintiffs sustained damage in the amount of $2,545.54 in moving their equipment to a

lower level where it would not be buried by the heavy winter snows and otherwise protecting and storing it; that the expense incurred in drying out damaged supplies and equipment and preparing for resuming operations in 1929 was $1,235.31; and that the reasonable rental value of such equipment for the portion of the time when work was suspended during which the equipment could have been rented was $34,500. Plaintiffs are entitled to recover the sum of these three items, $38,280.85, and judgment will be rendered accordingly.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

SUPPLEMENTAL OPINION ON MOTION TO DISMISS AND FOR A NEW TRIAL

GREEN, *Judge*, delivered the opinion of the court:

Counsel for defendant strenuously contend that the court erred in not sustaining their motion to dismiss plaintiffs' action as barred by the statute of limitations. It is argued that plaintiffs' case is based upon an alleged breach of the contract between the parties and that if this breach occurred at all it took place more than six years prior to the time when suit was begun, which was one day within six years from the time the contract was completed and more than six years from the time when the acts complained of occurred.

The evidence shows that the representatives of the defendant, about October 8, 1928, in effect, directed the plaintiffs to cease operations until further notice [see Findings 12 and 13], unless they were willing to finance the work themselves. In the opinion heretofore filed it was stated that this constituted a breach of the contract on the part of the defendant. This statement was too broad for the reason that the action of the defendant violated none of the express provisions of the contract. This is not a case where payments under the provisions of the contract had become due and the defendant had failed to make them.

Under the contract, payments were due as work was performed and estimates made. On completion of the contract a final amount became due for the work and claims in connection therewith, but nothing was due on these claims until the work was finished and the contract completed. When the defendant announced that it would stop making payments in accordance with the terms of the contract, the plaintiffs could have abandoned the project and sued on a *quantum meruit* for the work done and for damages. We do not have that kind of a case here. Instead the plaintiffs elected to proceed under the contract when permission was given to resume the work, but they could not obtain the final payment until it was finished, for the amount finally due the plaintiffs under the contract depended on its completion. When the defendant directed the work to be suspended until further notice, it delayed the completion of the contract if plaintiffs still elected (as they did) to proceed with the work when permitted, but if plaintiffs had abandoned the contract the delay would have been immaterial and no cause of action on account of damages for delay would have arisen. When plaintiffs continued to work under the contract, all of plaintiffs' claims were bound up with the completion of the project in accordance with its terms and this, we think, fixed the time when plaintiffs' cause of action arose.

As sustaining our former opinion, we cited the case of *Myerle* v. *United States*, 31 C. Cls. 105, 134. The general rule adopted by this court is that under a contract to perform work the completion thereof and its acceptance are what start the statute to run. *Pink, Liquidator*, v. *United States*, 85 C. Cls. 121, 124. And we have treated this rule as applicable to claims for delay. Our conclusion is that the former ruling on the motion to dismiss must be adhered to.

Another contention specially urged by counsel for defendant is that the plaintiffs cannot recover the rental value of their equipment for the period it was not in use, as shown by Finding 16, for the reason that the evidence fails to show that plaintiffs made any effort to lease the equipment to other parties and thus reduce the damage. It is a suffi-

Syllabus

cient answer to this contention that defendant only directed the stoppage of the work until further notice and it was therefore impossible for the plaintiffs to make a lease for any definite time. Besides this, it appears that the equipment was located at a high altitude and that there was lack of demand for it in the winter season. The circumstances are quite sufficient to show that it would have been impracticable for the plaintiffs to let the equipment out for any substantial sum.

The motion for new trial must be overruled and it is so ordered.

WILLIAMS, *Judge*; LITTLETON, *Judge*; and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in this decision.

BERTHA M. BAILEY AND W. C. BAILEY, JR., EXRS. OF THE ESTATE OF WALTER C. BAILEY, DECEASED, v. THE UNITED STATES

[No. 43505. Decided May 29, 1939. Findings amended and supplemental opinion on plaintiffs' motion for new trial, December 4, 1939]

On the Proofs

Estate tax: life insurance policy proceeds; effect of transfer of life ownership.—Where life insurance policies were issued to decedent on his own life between March 10, 1925, and January 2, 1929, and where on July 20, 1932, the decedent, by an instrument in writing, transferred the life ownership of the said policies to his wife and upon her death to his son; it is held that, since said policies were issued when the estate tax provisions of the revenue statute specifically provided that the proceeds of such life policies should be included in the gross estate for the purpose of determining the net estate subject to tax, and decedent continued after assignment to pay the premiums, the proceeds of such policies in excess of $40,000 were properly included in the gross estate.

Same.—The decedent, by assignment, divested himself of control over the policies, and the proceeds thereof, and the possibility of reverter to him in the event he survived the beneficiaries did not amount to a retention of such a beneficial interest therein as would, on that account, require the inclusion of the proceeds in the gross estate.

Same.—In section 302 (g) and (h) of the Revenue Acts of 1924 and 1926 and subsequent Acts, Congress has clearly expressed an intention to include in the taxable estate the proceeds of life insurance policies thereafter taken out by the insured upon his own life, notwithstanding an assignment by him of the right to receive the cash surrender value or to change the beneficiary.

Same; constitutionality.—Congress possessed the constitutional right to do so.

Same; rights of beneficiaries.—Whatever may be the rights of the beneficiaries under assignments, there is not a complete transfer of the net proceeds of the policy nor an absolute right to the possession and enjoyment thereof during the lifetime of the insured.

Estate tax; life insurance policy proceeds; payment of premiums by beneficiary after assignment.—Where beneficiary, who became the life owner of the policies upon the assignment of policies to said beneficiary, paid all premiums subsequent to the date of such assignment, it is held that the proceeds of such policies, in excess of the exemption of $40,000, could not, under the provisions of Section 302 of the Revenue Act of 1926 and Section 401 of the Revenue Act of 1932, be included in the gross estate of decedent for the purpose of determining the net estate subject to tax.

The Reporter's statement of the case:

Mr. Morris H. Goldman for the plaintiffs. *Mr. Fred W. Weitzel* was on the brief.

Mrs. Elizabeth B. Davis, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant. *Mr. Robert N. Anderson* and *Mr. Fred K. Dyar* were on the brief.

Plaintiffs seek to recover $11,179.38, estate tax paid in May 1934 and July 1935, alleged to have been erroneously and illegally collected. The question is whether the proceeds of certain life insurance contracts taken out by the decedent upon his own life between March 10, 1925, and January 2, 1929, were properly included by the defendant in the gross estate of the decedent to the extent that such proceeds exceeded $40,000 for the purpose of determining the net estate subject to tax.

The court, having made the foregoing introductory statement, originally entered special findings of fact as follows:

1. Plaintiffs are the duly appointed executors of the estate of Walter C. Bailey.

2. Walter C. Bailey (hereinafter sometimes referred to as the "decedent") died May 26, 1933, leaving a last will and

testament which was duly admitted to probate in the office of the Register of Wills of Montgomery County, Pennsylvania, June 2, 1933, on which date plaintiffs were made executors of the decedent's estate.

3. May 25, 1934, plaintiffs duly filed a federal estate tax return for the estate of Walter C. Bailey showing an estate tax liability of $7,607.87, which was paid on the same day.

October 4, 1934, plaintiffs made an additional payment of federal estate tax on behalf of the same estate of $35,000 and on July 16, 1935, made a further payment of federal estate tax and interest on behalf of that estate of $9,328.75.

4. May 1, 1935, plaintiffs, pursuant to the provisions of section 308 (d) of the revenue act of 1926, executed a waiver of restrictions against immediate assessment and collection of a deficiency in estate tax, which waiver contained the following provision:

> Consent is hereby given to the assessment, but the legality of the amount is hereby denied. The executors of the estate reserve their right to bring action to recover the amount of tax illegally assessed. This is a mere waiver of the right of immediate assessment, but is not an admission of liability for the deficiency. It is contended that the Government erred in including as an element of the gross estate the insurance in excess of $40,000.00, as the insured was not the life owner of such policies.

5. The sum of $51,936.62, paid as shown in finding 3, was in payment of the total estate tax liability for the decedent's estate as determined by the Commissioner of Internal Revenue to be due to the United States under the internal revenue laws, with interest as provided by law, after giving plaintiffs full credit for state estate, inheritance, legacy, or succession taxes paid by plaintiffs as executors of the decedent's estate to the Commonwealth of Pennsylvania.

6. At the time of his death the life of the decedent was insured by Aetna Life Insurance Company of Hartford, Connecticut, under six policies of life insurance as follows:

Policy No.	N 485157,	executed	March 10, 1925,	for	$64,000
"	" N 705296,	"	Nov. 2, 1927,	"	$50,000
"	" N 771925,	"	Dec. 12, 1928,	"	$25,000
"	" N 771926,	"	Dec. 21, 1928,	"	$15,000
"	" N 773481,	"	Jan. 2, 1929,	"	$5,000
"	" N 773482,	"	Jan. 2, 1929,	"	$5,000

In each of these policies Bertha M. Bailey, wife of the decedent, was named beneficiary and each of the policies contained the following provisions:

> *Who may borrow on the policy, receive cash values, and exercise other privileges*
>
> During the lifetime of the insured the right to receive all cash values, loans, and other benefits accruing hereunder, to exercise all options and privileges described herein and to agree with the Company to any change in or amendment to this policy shall vest alone in the insured (herein called the life owner), subject, however, to any assignment by said life owner.
>
> *How a beneficiary may be changed*
>
> The beneficiary may be changed as often as desired, and such change shall take effect on receipt at the Home Office of the Company, before the sum insured or any instalment thereof becomes due, of a written request accompanied by the policy for endorsement. If any beneficiary dies before the insured, the interest of such beneficiary shall vest in the life owner alone unless otherwise provided herein.

7. July 12, 1932, the decedent made application to the Aetna Life Insurance Company with respect to each of the six policies of insurance referred to in finding 6, requesting that the life ownership of, and beneficiary under, each of those contracts of insurance be changed.

In response to that request the Aetna Life Insurance Company on July 20, 1932, executed a "Beneficiary Agreement" with respect to each of the six policies and an agreement as to change of life ownership, which read as follows:

> The net sum payable by the Company under this policy by reason of the death of the insured shall be payable in one sum to Bertha M. Bailey, wife of the insured if she survives the insured, otherwise to Walter Conard Bailey, son of the insured, if he survives the insured, otherwise as hereinafter provided.
>
> One-third (1/3) of said net sum shall be payable to Letitia Owens Bailey, wife of said Walter Conard Bailey, if she survives the insured, otherwise in equal shares to the children of said Walter Conard Bailey who survive the insured, if any, otherwise to the executors, administrators, or assigns of the insured.

Reporter's Statement of the Case

The remainder (2/3) of said net sum shall be payable in equal shares to the children of said Walter Conard Bailey who survive the insured, if any, otherwise to said wife of said Walter Conard Bailey if she survives the insured, otherwise to the executors, administrators, or assigns of the insured.

* * * * *

Life owner under this policy is hereby changed as follows:

Until the death of Bertha M. Bailey, wife of the insured, said wife shall be the life owner.

After the death of said wife and until the death of Walter Conard Bailey, son of the insured, said son shall be the life owner.

After the death of the survivor of said wife and said son, the insured shall be the life owner.

The foregoing request for change of life ownership of, and beneficiary under, the six policies of insurance was not made by the decedent in contemplation of death. So far as appears from the evidence the decedent continued until his death to pay the premiums on the policies mentioned above. (This finding amended. See supplemental opinion on motion for new trial.)

8. The records of the Aetna Life Insurance Company after July 20, 1932, and until the decedent's death, showed Bertha M. Bailey, wife of the decedent, as the life owner of the foregoing policies and the insurance company considered and treated her as the life owner.

After July 20, 1932, and until the decedent's death, the Aetna Life Insurance Company would have paid to Bertha M. Bailey, wife of the decedent, any benefits that accrued under the terms of the policies and would have allowed her to exercise all the rights and privileges described in the policies, including the right to surrender the policies and receive the cash surrender value, to make loans on the policies, and to change the beneficiary thereof without the consent of any other person.

9. Bertha M. Bailey and Walter Conard Bailey, wife and son, respectively, of the decedent and mentioned in the six policies of life insurance, survived the decedent and the net proceeds of those policies, $148,364.86, were paid by the Aetna Life Insurance Company to Bertha M. Bailey. The

Federal estate tax and interest in the amount of $51,936.62 as determined by the Commissioner and paid by the plaintiffs in the amounts and at the times heretofore stated were computed by the Commissioner by including as part of the gross estate of the decedent $108,364.86 ($148,364.86 less $40,000) of the proceeds of the foregoing life insurance policies paid to Bertha M. Bailey. The tax and interest so determined by the Commissioner was $11,179.98 in excess of the amount which would have been due had the $108,364.86 of the proceeds of the insurance policies paid to Bertha M. Bailey not been included in the computation of the value of the gross estate for estate tax purposes.

10. September 23, 1935, plaintiffs duly filed a claim for refund of estate tax with interest in the amount of $11,-179.98 on the ground that the proceeds of the life insurance policies were illegally and erroneously included by the Commissioner as a part of the gross estate of the decedent. The Commissioner rejected that claim October 12, 1935.

11. The decedent did not file any gift tax return for the year 1932 and did not pay any gift tax for that year on the value of the policies as of July 20, 1932.

The court, on the original hearing, decided that the plaintiffs were not entitled to recover; but on a supplemental motion by the plaintiffs for a new trial, and upon submission of additional evidence, finding #7 was amended, and the court decided that the plaintiffs were entitled to recover. See opinion on motion for new trial, and order.

LITTLETON, *Judge*, delivered the opinion of the court:

Plaintiffs contend that no portion of the net proceeds of $148,364.86 of six life insurance policies taken out by the decedent upon his own life between March 10, 1925, and January 2, 1929, was includable in the gross estate of the decedent, Walter C. Bailey, who died May 26, 1933, for the reason that on July 20, 1932, the decedent, by an instrument in writing on that date, made an assignment of the policies to his wife establishing a change of beneficiaries thereunder and making his wife, and upon her death his son, the life owner and after which, until the date of his death, the decedent did not possess any legal incidents of ownership of such policies.

The defendant contends that inasmuch as the life insurance contracts in question were taken out by the decedent upon his own life at a time when the estate tax provisions of the revenue statute specifically provided, without exception, for the inclusion of the proceeds of such policies in the gross estate for the purpose of determining the net estate subject to tax, and which provision was in force and effect at the time of the death of Walter C. Bailey, the proceeds of such policies of $148,364.86, which was the net amount payable to the beneficiary upon his death in excess of $40,000, were properly included in the gross estate.

Section 302 (g) of the Revenue Act of June 2, 1924, provided "The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated * * * to the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life." (43 Stat. 253, 305.)

Subdivision (h) of section 302 provided that "Subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act." These provisions were continued and reenacted in section 302 (g) and (h), Revenue Act of 1926, (44 Stat. 9, 71) and continued in force thereafter by section 401 of the Revenue Act of 1932 (47 Stat. 169, 243) in effect at the time of the death of Walter C. Bailey, May 26, 1933. It will thus be seen that prior to the date on which the six insurance policies in question were taken out by the decedent upon his own life and at all times thereafter, the estate tax provisions of the taxing act specifically provided, without exception, for the inclusion in the gross estate of the amount receivable by all beneficiaries, other than the estate in excess of $40,000, as insurance under such policies taken out by the decedent upon his own life.

Plaintiffs' contention is based upon the theory that because the decedent in July 1932 made an assignment of the policies to his wife, who was designated beneficiary thereunder, under which she became the life owner of the policies and under the terms of the policies was vested with the right to exercise all the rights and privileges described in the policies, including the right to surrender the policies and receive the cash surrender value, to make loans on the policies, and to change the beneficiaries thereof without the consent of any other person, the proceeds payable by the Insurance Company upon the death of Bailey were not includable in the gross estate of the decedent for the reason that at the time of his death he did not possess any of the incidents of ownership of the policies. The change in question was made within two years prior to the decedent's death, but there is no claim by the defendant that the assignment was made in contemplation of death. By assignment, the decedent divested himself of control over the policies and their proceeds and the possibility of reverter to him in the event he survived the beneficiaries did not amount to a retention of such a beneficial interest therein as would, on that account, require the inclusion of the proceeds in the gross estate. *Bingham, et al.* v. *United States*, 296 U. S. 211.

We are of opinion however that this is immaterial since all the policies in question were taken out by the decedent upon his own life and the assignment thereof was made at a time when the revenue acts taxed all insurance receivable by beneficiaries other than the decedent's estate in excess of $40,000 and required the inclusion thereof in the gross estate for the purpose of determining the net estate subject to tax. Plaintiffs rely upon *Bingham et al.* v. *United States*, *supra*, but that case involved insurance policies with respect of which the assignment by the decedent was made and the interests of the beneficiaries had vested prior to the enactment of the Revenue Act of 1918, which was the first act imposing an estate tax upon such insurance proceeds. In that case the court referred to its earlier decision in *Lewellyn* v. *Frick*, 268 U. S. 238 (which the Government in its argument attempted to distinguish), and said at page 218:

> * * * These policies in terms were identical with the corresponding policies in question here. The assign-

ment of the Berkshire policy there was the same as the assignments here. This court applied the rule that acts of Congress are to be construed, if possible, so as to avoid grave doubts as to their constitutionality; and said that such doubts were avoided by construing the statute as referring only to transactions taking place after it was passed. In that connection we invoked the general principle "that the laws are not to be considered as applying to cases which arose before their passage" when to disregard it would be to impose an unexpected liability that, if known, might have been avoided by those concerned. * * *

The Court then discussed the cases of *Helvering* v. *St. Louis Union Trust Co.*, 296 U. S. 39, and *Becker* v. *St. Louis Union Trust Co.*, 296 U. S. 48, and in this connection said, at page 219:

> * * * Those principles establish that the title and possession of the beneficiary were fixed by the terms of the policies and assignments thereof, beyond the power of the insured to affect, many years before the act here in question was passed. No interest passed to the beneficiary as the result of the death of the insured. His death merely put an end to the possibility that the predecease of his wife would give a different direction to the payment of the policies.

It thus appears that the Supreme Court emphasized the fact that the policies there involved were issued and the assignments made prior to the taxing act and that it did not construe the act as applying to interests vested prior to its passage.

In *Chase National Bank et al.* v. *United States*, 278 U. S. 327, the court held that in the case of insurance policies issued prior to the passage of the Revenue Act, but over which the decedent retained control or in which he had some beneficial interest, the proceeds were taxable as part of the gross estate. From this it will be seen that the Supreme Court has held that the proceeds of life-insurance policies are includable in the gross estate notwithstanding they were taken out before the passage of the statute taxing such proceeds if the decedent retained any incident of ownership therein or control thereof. And, on the other hand, it has been held that such proceeds are not subject to the estate tax if the insured

prior to the enactment of the taxing act had divested himself of ownership and control thereof and the interests of the beneficiaries had become vested. In none of the cases above referred to has the court passed upon the question whether life-insurance proceeds may be included in the gross estate when the decedent took out the policies of insurance on his own life and made an assignment thereof at a time when the taxing act clearly required, without exception, the inclusion of the proceeds of such policies in the gross estate. Here the decedent was upon notice at the time he took out the policies upon his own life and at the time he made the assignment that the proceeds thereof were subject, by express provision of law, to inclusion in his gross estate. Plaintiffs' position necessarily assumes, although the contention is not specifically made, that to the extent that the taxing statute requires the inclusion in gross estate of the insurance proceeds of the policies taken out after the passage of the act, where the decedent has made an assignment of the policies and surrendered the right to change the beneficiaries, such act is unconstitutional. But, in the circumstances here present, we find nothing arbitrary or capricious in the statutory requirement that the proceeds of life-insurance policies be included in the decedent's gross estate, nor do we think it can properly be said that the requirement that such proceeds be included in the gross estate deprives the beneficiary of property without due process of law. Life insurance is inherently testamentary in character. The payment of premiums and the insured's death are the necessary events giving rise to the full and complete possession and enjoyment of the face amount of the policies by the beneficiary. The acquisition of life-insurance policies on one's own life is a substitute for a testamentary disposition of property, and to allow an insured to avoid the estate tax upon his estate by making an assignment of policies taken out by him, and upon which he paid the premiums at a time when the statute required the inclusion of the proceeds of such policies in his gross estate, would be contrary to the clear language of the statute. Compare *Burnet* v. *Wells*, 289 U. S. 670.

In *Helvering* v. *City Bank Farmers Trust Co.*, 296 U. S. 85, the court had before it the case involving section 302 (d)

(44 Stat. 9, 71) of the Revenue Act of 1926 which provided for the inclusion in the gross estate of property "to the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth." In that connection the court at pages 89–90, 92 said:

> We are next told that if the Act means what it says it taxes a transfer as one taking effect at death though made prior to death and complete when made; that to do this is arbitrary and deprives the taxpayer of property without due process.
>
> The section was first introduced into the Revenue Act of 1924, and reenacted in that of 1926. Mrs. James created her trust in 1930. She was, therefore, upon notice of the law's command, and there can be no claim that the statute is retroactive in its application to her transfer.
>
> The inquiry is whether it is arbitrary and unreasonable to prescribe for the future that, as respects the estate tax, a transfer, complete when made, shall be deemed complete only at the transferor's death, if he reserves power to revoke or alter exercisable jointly with another.
>
> * * * * *
>
> In view of the evident purpose of Congress we find nothing unreasonable or arbitrary in the provisions of § 302 (d) of the Revenue Act of 1926 as applied in the circumstances of this case. It was appropriate for Congress to prescribe that if, subsequently to the passage of that Act, the creator of a trust estate saw fit to reserve to himself jointly with any other person the power of revocation or alteration, the transaction should be deemed to be testamentary in character, that is, treated for the purposes of the law as intended to take effect in possession or enjoyment at the death of the settlor.

We think there is equal justification for the inclusion in the gross estate of the proceeds of life-insurance policies taken out by the decedent upon his own life after the passage of the act specifically taxing such proceeds as was present in the circumstances disclosed in *Helvering* v. *City Bank Farmers Trust Co.*, *supra*. *Cf. Porter* v. *Commissioner of Internal*

Revenue, 288 U. S. 436. Subdivision (d) of section 302 made the retention of some authority by decedent concerning the property necessary to the inclusion of its entire value in the gross estate. Subdivision (g) contains no such provision.

The case at bar is somewhat similar to cases involving tenancies. In the joint tenancy cases it was held that with respect to tenancies created before the passage of the 1916 Act only one-half of the value of property so held was subject to inclusion in gross estate under the Revenue Act of 1921 which was not specifically retroactive, but that in cases arising under the Act of 1924 and subsequent acts the entire amount of the value of property so held was subject to inclusion in the gross estate since the acts expressly so provided. *Knox* v. *McElligott*, 258 U. S. 546; *Cahn* v. *United States*, 297 U. S. 691; *Gwinn* v. *Commissioner*, 287 U. S. 224; *B. Frank Bushman* v. *United States*, 80 C. Cls. 175; *O'Shaughnessy* v. *Commissioner*, 60 Fed. (2d) 235.

In all the cases cited and relied upon by plaintiffs, except *Walker* v. *United States*, 83 Fed. (2d) 103; *Helburn* v. *Ballard*, 85 Fed. (2d) 613; *Boswell et al.* v. *Commissioner*, 37 B. T. A. 970, the insurance policies were taken out by the decedent and the assignments involved were made by him prior to the enactment of the provision requiring the inclusion of such proceeds in the gross estate. For the reasons hereinbefore stated, we are unable to concur in the conclusions reached in the last three cases mentioned above in which the courts appear to have based their conclusion that the statute did not provide for the inclusion of insurance proceeds in the gross estate where assignments had been made, even though the policies were taken out by decedent and assignment made after the approval of the act, upon the sole ground that such proceeds were received pursuant to the assignments rather than as a result of any transfer by death. The decisions do not appear to have given serious consideration and weight to the effect of the statutory provisions upon policies of insurance taken out by decedent, and upon which he paid the premiums and which policies he assigned after the enactment of the sections specifically requiring the inclusion of the proceeds thereof in his gross estate. We think Congress in section 302 (g) and (h) of

the Revenue Acts of 1924 and 1926 and subsequent acts has clearly expressed an intention to include the proceeds of life-insurance policies thereafter taken out by the decedent upon his own life notwithstanding an assignment by him of his right to receive the cash-surrender value or to change the beneficiary, especially where he continues after such assignment to pay the premiums upon the policies. We think Congress possessed the constitutional power to do so. Whatever may be the rights of the beneficiaries under assignments, there is not a complete transmission of the net proceeds of the face amount of the policy or an absolute right to the possession and enjoyment thereof during the lifetime of the insured. His death, coupled with the payment of premiums, is the indispensable event giving rise to or enlarging the enjoyment of valuable property rights not theretofore possessed or enjoyed. There was therefore, we think, a sufficient transfer by decedent's death of an enlarged enjoyment of economic benefits by the beneficiary to justify the imposition of the tax upon such proceeds in cases of policies subsequently taken out and subsequently assigned.

Plaintiffs are not entitled to recover and the petition is dismissed. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

OPINION ON PLAINTIFFS' MOTION FOR NEW TRIAL

LITTLETON, *Judge*, delivered the opinion of the court:

In this case the court on May 29, 1939, entered findings of fact, conclusion of law, and opinion dismissing the petition on the ground that sections 302 of the Revenue Act of 1926 and 401 of the Revenue Act of 1932 required the inclusion in the decedent's gross estate of the proceeds in excess of $40,000 of insurance under policies taken out by the decedent upon his own life between March 1925 and January 1929 when the facts show that the decedent continued after the assignment of the policies on July 20, 1932, to pay the premiums thereon until his death in 1933.

Supplemental Opinion of the Court

Upon the filing by the executors of a supplemental motion for a new trial stating that they believed they would be able to show, if permitted to do so, that the beneficiary under the policies, and to whom the policies had been assigned, paid the premiums thereon subsequent to the assignment and until the death of the decedent, the parties were permitted to submit additional evidence with reference to whether or not the premiums on the policies in question between the date of their assignment and the death of the decedent were paid by the decedent or the beneficiary to whom such policies had been assigned. Additional evidence was submitted by plaintiffs and it shows that the beneficiary who became the life owner of the policies upon the assignment paid all premiums subsequent to the date of such assignment. Accordingly, an order has been entered vacating and withdrawing the last sentence of finding 7 of the court's findings entered May 29, 1939, and entering, in lieu thereof, a finding that "Subsequent to July 20, 1932, all premiums thereon were paid by the beneficiary and life owner, Bertha M. Bailey, from her individual and separate funds." In view of this fact, the court is of opinion that plaintiffs are entitled to recover the tax and interest of $11,179.98 paid as a result of the inclusion in the gross estate by the Commissioner of Internal Revenue of the proceeds of such policies in excess of the exemption of $40,000 and an order has been entered withdrawing the former conclusion of law dismissing the petition and entering a conclusion of law upon the facts as they now appear awarding the plaintiffs judgment of the amount above stated with interest as required by law.

The case was originally tried and submitted upon the proposition that the proceeds of the insurance policies could not under the provisions of sections 302 and 401, *supra*, be included in the gross estate for the purpose of determining the net estate subject to tax, even if the decedent had continued after the assignment to pay the premiums. The former opinion of the court stands as authority that where the decedent continues to pay the premiums the proceeds must be included in the gross estate. The Departmental Regulations are not inconsistent with this view. The former opinion is modified only to the extent that it may be regarded as holding

Syllabus

that sections 302 and 401 require the inclusion in the gross estate of insurance proceeds under policies unconditionally assigned where the premiums are subsequently paid by the beneficiary, or the person to whom assigned, from his or her own funds.

WHITAKER, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

As stated in the supplemental opinion, the last sentence of finding #7 was vacated and withdrawn, and in lieu thereof the following finding was made:

> Subsequent to July 20, 1932, all premiums thereon were paid by the beneficiary, and life owner, Bertha M. Bailey, from her individual and separate funds.

The former conclusion of law and judgment dismissing the petition were vacated and withdrawn, and in lieu thereof judgment for the plaintiffs was rendered in the sum of $11,179.98, with interest according to law.

[NOTE: See subsequent decision, March 4, 1940, allowing defendant's motion for new trial in this case and dismissing the petition.]

THE WICHITA AND AFFILIATED BANDS OF INDIANS IN OKLAHOMA, THE TOWACONIES, WACOS, KEECHIS, IONIES, AND THE DELAWARE BAND OF THE WICHITA TRIBE, AND THE INDIVIDUAL MEMBERS OF SAID WICHITA AND AFFILIATED BANDS OF INDIANS, PLAINTIFFS v. THE UNITED STATES

THE CADDO BAND OF INDIANS OF THE STATE OF OKLAHOMA v. THE UNITED STATES

[No. E-542. Decided November 6, 1939]

On the Proofs

Indian claims; aboriginal occupancy.—A claim based solely upon aboriginal occupancy is not within the terms of the Jurisdictional Act.

Syllabus

Same; claims not sustained.—It is held that the available facts and history do not support the contention of plaintiffs that they claimed as their own and exclusively possessed and occupied the vast area or territory, described in the petition, with the recognition and consent of other tribes and bands of Indians prior to and subsequent to the Quapaw treaty of 1818 and the Choctaw treaties of 1820, 1830, 1855, and 1866.

Same; treaties.—Without express authority from Congress, or authority otherwise clearly indicated, the courts are bound to recognize treaties as lawfully made and as the supreme law of the land.

Same; "Leased District cases" affirmed.—Upon the evidence and information upon which the Court passed in the *Leased District cases*, and upon such additional evidence and information as has been submitted in the instant case, the holding of the Court in said *Leased District cases* is affirmed.

Same; immemorial possession.—A claim to title to lands based on immemorial possession cannot be sustained where the evidence shows that other tribes similarly occupied and possessed such territory.

Same; treaty of 1835.—It is clear from the provisions and purposes of the treaty of August 24, 1835, that there was no recognition of title, possessory or otherwise, accorded by the United States to any Indian tribe party to the treaty.

Same; treaty of 1846.—A consideration of the provisions of the treaty of May 15, 1846, fails to reveal any provision that may be considered a recognition on the part of the United States of Indian title in any land as belonging to plaintiffs.

Same; Texas public lands.—All public lands within the borders of Texas remained, upon the admission of Texas as a State, the property of the State, and the United States has never at any time had title to or claimed any public lands in that State; when the Indians were removed by the United States from Texas, the reservation in that State formerly occupied by them became the property of the State and the lands were added by Texas to its public domain; and in these circumstances it is held that the United States cannot be held liable to compensate these Indians for the loss of their lands in Texas, in and to which the United States had no right, title, or interest before or after the Indians were compelled to abandon them.

Same; compensation for property and houses.—Where the record shows that the United States and its agents did everything they reasonably could to remove from Texas, with the Indians, all of their movable property, and where it is shown that upon removal the Indians were furnished with houses better than they had previously had, it is held that there can be no recovery for these items.

The Reporter's statement of the case:

Mr. Francis M. Goodwin for the plaintiffs. *Mr. Charles J. Kappler* was on the brief.

Mr. C. C. Calhoun for the intervenors. *Mr. C. Ross Hume* was on the brief.

Mr. Charles H. Small, with whom was *Mr. Assistant Attorney General Carl McFarland*, for the defendant. *Mr. George T. Stormont* was on the brief.

In this case the Wichita tribe and the affiliated bands of Indians in Oklahoma seek to recover the principal sum of $10,642,640.75, with interest from various dates as compensation for 10,238,653 acres of land, and $1,648,097.38 in money, all of which they allege the United States unlawfully appropriated to its own use and to the use of other tribes of Indians. Included in this claim also is $40,000 as alleged compensation for loss of personal property and houses in Texas in 1859. The Wichita tribe and affiliated bands base their claimed right to recover for the lands in question and money derived therefrom upon (1) immemorial possession and occupation; (2) the alleged recognition of their right to the claimed territory by the treaty of Camp Holmes of August 24, 1835 (7 Stat. 474), between the United States and all the Indians, comprising the Comanche and Wichita nations and their associated bands and tribes, and the Cherokee, Muskogee, Creek, Choctaw, Osage, Seneca, and Quapaw tribes. In addition the Wichitas made claim in the petition for $75,000 which they allege they were compelled to expend in and prior to 1900 to defend their right to lands against a claim of the Choctaw and Chickasaw nations in the case of *The Choctaw and Chickasaw Nations* v. *The United States and the Wichita and Affiliated Bands of Indians*, 34 C. Cls. 17 (179 U. S. 494).

The intervenors, the Caddo Band of Indians of the State of Oklahoma, claim to have become recognized affiliates of the Wichita tribe, and by a separate intervening petition they join in the claims of the Wichita and affiliated bands, and, in addition, claim is made by these Indians for $80,000 as the unpaid consideration in a treaty with them of July

1, 1835 (7 Stat. 470); $80,000 for loss of property in Texas upon their removal in 1859 and $25,000 alleged to have been expended in the Choctaw and Chickasaw, or "Leased District," cases for which they claim the government should reimburse them.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. The Wichita tribe of Indians, called in their own language Kiti-kitish, by the Spanish Taovayase, and by the French Ouachita and Panies Piques, were, so far as history indicates, first met with by white men about 1688 in the province of Louisiana on or near the Ouachita River. The Ouachitas appear to be descendants of the once powerful Pawnee tribe of Indians and they, early in the eighteenth century, as a result of wars with other Indian tribes, especially the Osage tribe, were driven south. In 1719 they went south on a branch of the Arkansas River, evidently the Canadian, to a location not far from its mouth. The word "Wichita" is said to be the Osage word meaning "scattered camps," "moving about." Subsequent to 1719, because of wars with other tribes which resulted in a material reduction of their total population, the Wichita tribe moved westward and up the Red River to a point which is now the State of Texas. Since about 1750 the Wichitas and certain members of their affiliated bands (Towaconies, Wacos, Keechis, Ionies, and the Delawares) have lived and hunted a part of the time on the south bank of the Red River in what is now Texas and a part of the time on the north bank of said river in territory which later became a part of Oklahoma. A number of other tribes of Indians also lived, roamed, and hunted in the same territory for which the Wichitas and affiliated bands claim compensation in this case because of their alleged undisputed possession and occupancy. Among a number of other tribes of Indians so occupying and hunting over the territory claimed by plaintiffs were the Comanche, Kiowa, and Kiowa-Apache. During 1758 and 1759 the Wichitas joined other Indian tribes, occupying two villages on each bank of the Red River where three forks of that stream unite to the west of the Wishita Mountain. Early in

the nineteenth century sundry Wichita villages were reported to be up the Red River in Spanish territory. In 1834 Dodge, with Catlin, found a toyash (Wichita) village on the North Fork of the Red River near Elk Creek and was told by the Indians that they had come from the south. The Wichitas were seminomadic Indians, remaining in a settled place for some time and building thatched huts shaped like a beehive. Wherever they established their camps, the Wichitas engaged in cultivating the soil, the exact extent not being disclosed by the record. The women of the tribe did all the agricultural work in which the tribe engaged and in these gardens, or areas, so cultivated they raised corn, melons, squash, and tobacco. They had no regular agricultural implements and appear to have used buffalo shoulder blades as tools. The male members of the Wichitas were engaged as warriors to protect the tribe and their villages so far as possible against other Indians and as hunters of buffalo, which were plentiful in the territory involved in this suit. Their hunts were not for long distances, usually being for about two days. The Wichitas appear also to have engaged in trade, principally with the Comanches, exchanging agricultural products for buffalo hides and horses. The Wichita tribe proper was never a very large tribe—the maximum population thereof, so far as disclosed by the record, never having been greater than about four thousand. This was prior to the time they were driven by wars with the Osages from the territory now in Kansas to the Canadian and Arkansas Rivers and, later, across the territory between the Canadian and Red Rivers to a point south of the Red River. During this time, which appears to have been between 1719 and 1758, their population was very materially reduced so that during the time they lived, roamed, and were driven farther west or southwest by the Osages or other tribes, their population was reduced to between five hundred and a thousand. In their migrations from the mouth of the Canadian River at the Arkansas westward or southwestward, from about 1717 or 1719, they did not remain long at any one place. They were continually being attacked by the Osage war parties, who constantly drove them westward, or they moved for other reasons. The record shows that

about 1770 the Wichitas, as a result of being driven westward of the Arkansas River by the Osage tribe and between the Canadian and Red Rivers, were located at a point about where the Red River enters the Cross Timbers. The Cross Timbers were two belts of timber about thirty miles wide extending southwest from the Arkansas River to Texas. At that time the Wichitas resided and had villages on both sides of the Red River; those south of the river being in Spain, later Mexico and Texas, and those north in what was later known as the Louisiana Territory and Oklahoma. About 1820 the Wichitas moved up the Red River and established villages; they remained for some time near the mouth of the Big Wichita in territory which is now in Texas, near Cache Creek. Wichita Falls, Texas, is now the nearest town to this point. Later they moved up to the North Fork of the Red River near the mouth of Otter Creek and still later they moved up near the Dokana Mountains (Mt. Webster) where they were found by the Dodge, or Pawnee, Expedition about 1834. This expedition went west from Ft. Sill, which was a point west of the 98th meridian, and met the Comanches, Kiowas, Kiowa-Apaches, Osages, and the Wichitas; thence south and west of the Wichita Mountains and then to the Wichita village near Mt. Webster on the North Fork of the Red River. About 1833 the Osage Indians went down on the north side of the Wichita Mountains and engaged in war with the Kiowas, killing a number of the members of the tribe and taking some captive. When the Dodge Expedition met the Osage tribe, they purchased from them a captive Kiowa girl and boy, in order to make friends with the Kiowas when they reached them. The Kiowa boy was accidentally killed. The expedition, upon reaching the Kiowas, delivered the girl captive to that tribe and, thereby, established friendly relations. Following this expedition, and as a result of treaties subsequently made, peaceful relations were established between the Comanches, Kiowas, Kiowa-Apaches, Osages, and the Wichitas and affiliated bands. As a result of the peaceful relations established by the peace treaty of 1835 with the Comanche, Wichita, Cherokee, Muskogee, Choctaw, Osage, Seneca, and Quapaw nations and associated bands, the war pressure which had theretofore

constantly been exerted upon the Wichita and other tribes was removed and the Wichitas thereafter commenced moving eastward between the Canadian River on the north and the Red River on the south. Sometime subsequent to 1835 and until about 1860, the Wichitas roamed, lived, hunted, and established villages from time to time in certain parts of the territory between the Canadian River on the north, the Red River on the south, the 98th meridian on the east, and the 100th meridian on the west. The affiliated bands of the Wichitas, or most of them, remained south of the Red River and west of the 100th meridian in a territory which is now in the State of Texas. During this time the population of the Wichita tribe proper was very small. At no time prior or subsequent to 1835 did the Wichita tribe and its affiliated bands exclusively possess, occupy, or hunt over the entire territory herein claimed; nor did they possess and occupy at any time any very large portion of such territory to the exclusion of other tribes or bands of Indians or with the full recognition by such other tribes or bands to the right of the Wichitas to exclusive possession and occupancy. The southern Comanches, Kiowas, and Kiowa-Apaches, who appear for the most part to have been on reasonably friendly terms with the Wichitas, were among the other Indians who also occupied, roamed, and hunted over the territory for which the Wichitas now seek to recover compensation during the time the Wichitas were in this territory, and while they were being driven or moved from near the Arkansas westward and south of Red River. The Comanche and other tribes of Indians who lived principally by the chase, and who lived, hunted, and roamed over this territory, were greatly superior to the Wichitas in number. The record shows that tribes of Indians other than the Wichitas and affiliated bands hunted, roamed, and lived over a much greater area now claimed by plaintiffs than did the Wichitas and affiliated bands, and the record does not show that any of the other tribes of Indians within this territory, during the time plaintiffs' claim they had undisputed possession and occupancy, recognized the right of the Wichitas and affiliated bands to exclusive possession of any of the territory other than within their immediate villages. The record clearly

shows that the Osages, to whom the Quapaws appear to have been related, never recognized the right of any tribe to the exclusive possession and occupancy of any of this territory and particularly did the Osages not recognize the right of the Wichitas and affiliated bands to possession and occupancy of this territory for the reason that at all times prior to the treaty of peace in 1835, hereinafter quoted, the Osages were constantly at war with the Wichitas and other tribes and drove them westward to and beyond the western limits of the territory in the Louisiana province (later Oklahoma) which the Wichita and affiliated bands now claim to have exclusively possessed and occupied from time immemorial, and for which they seek compensation as for a taking by the United States. (See *The Choctaw and Chickasaw Nations* v. *The United States and the Wichita and Affiliated Bands of Indians*, 34 C. Cls. 17.) The record in this case does not establish as a fact that the Wichitas and affiliated bands of Indians at any time prior to 1859 ever possessed or occupied, to the exclusion of other tribes or bands of Indians, an area, within the territory which they claim, greater than the reservation within that territory of 743,257.19 acres which was set aside for and given to them by the United States for their absolute use and occupancy.

A treaty of peace and friendship was concluded August 24, 1835, and was proclaimed May 19, 1836 (7 Stat. 474), between the Comanche and Wichita nations and bands or tribes and between these nations or tribes and the Cherokee, Muskogee, Choctaw, Osage, Seneca, and Quapaw nations or tribes, the pertinent portions of which are as follows:

> For the purpose of establishing and perpetuating peace and friendship between the United States of America and the Comanche and Witchetaw nations, and their associated bands or tribes of Indians, and between these nations or tribes, and the Cherokee, Muscogee, Choctaw, Osage, Seneca, and Quapaw nations or tribes of Indians, the President of the United States has, to accomplish this desirable object, and to aid therein, appointed Governor M. Stokes, M. Arbuckle, Brigdi. Genl. United States army, and F. W. Armstrong, Actg. Supdt. Western Territory, commissioners on the part of the United States: and the said Governor M. Stokes and M. Arbuckle, Brigdi. Genl. United States army, with

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the chiefs and representatives of the Cherokee, Muscogee, Choctaw, Osage, Seneca, and Quapaw nations or tribes of Indians, have met the chiefs, warriors, and representatives of the tribes first above named at Camp Holmes, on the eastern border of the Grand Prairie, near the Canadian river, in the Muscogee nation, and after full deliberation, the said nations or tribes have agreed with the United States, and with one another upon the following articles:

ARTICLE 1. There shall be perpetual peace and friendship between all the citizens of the United States of America, and all the individuals composing the Comanche and Witchetaw nations and their associated bands or tribes of Indians, and between these nations or tribes and the Cherokee, Muscogee, Choctaw, Osage, Seneca, and Quapaw nations or tribes of Indians.

* * * * *

ARTICLE 3. There shall be a free and friendly intercourse between all the contracting parties hereto, and it is distinctly understood and agreed by the Comanche and Witchetaw nations and their associated bands or tribes of Indians, that the citizens of the United States are freely permitted to pass and repass through their settlements or hunting ground without molestation or injury on their way to any of the provinces of the Republic of Mexico, or returning therefrom, and that each of the nations or tribes named in this article, further agree to pay the full value for any injury their people may do to the goods or property of the citizens of the United States taken or destroyed when peaceably passing through the country they inhabit, or hunt in, or elsewhere. * * *

ARTICLE 4. It is understood and agreed by all the nations or tribes of Indians parties to this treaty, that each and all of the said nations or tribes have free permission to hunt and trap in the Great Prairie west of the Cross Timber, to the western limits of the United States.

ARTICLE 5. The Comanche and Witchetaw nations and their associated bands or tribes of Indians, severally agree and bind themselves to pay full value for any injury their people may do to the goods or other property of such traders as the President of the United States may place near to their settlements or hunting ground for the purpose of trading with them.

ARTICLE 6. The Comanche and Witchetaw nations and their associated bands or tribes of Indians, agree, that

in the event any of the red people belonging to the nations or tribes residing south of the Missouri river and west of the State of Missouri, not parties to this treaty, should visit their towns or be found on their hunting ground, that they will treat them with kindness and friendship and do no injury to them in any way whatever.

* * * * *

ARTICLE 8. It is agreed by the commissioners of the United States, that in consequence of the Comanche and Witchetaw nations and their associated bands or tribes of Indians having freely and willingly entered into this treaty, and it being the first they have made with the United States or any of the contracting parties, that they shall receive presents immediately after signing, as a donation from the United States; nothing being asked from these nations or tribes in return, except to remain at peace with the parties hereto, which their own good and that of their posterity require.

ARTICLE 9. The Comanche and Witchetaw nations and their associated bands or tribes of Indians, agree, that their entering into this treaty shall in no respect interrupt their friendly relations with the Republic of Mexico, where they all frequently hunt and the Comanche nation principally inhabit; and it is distinctly understood that the Government of the United States desires that perfect peace shall exist between the nations or tribes named in this article and the said republic.

2. On May 15, 1846, a treaty was made and concluded at Council Springs, in the County of Robinson, Texas, near the Brazos River, between certain commissioners of the United States and certain Indian chiefs, counsellors, and warriors of the Comanche, Ioni, Anadaca, Cadoe, Lepan, Longwha, Keechy, Tahwacarro, Wichita, and Wacoe tribes of Indians and their associated bands. This treaty was ratified February 15, 1847 (9 Stat. 844), and was proclaimed on March 8, 1847, and is as follows:

Article I

The undersigned chiefs, warriors, and counsellors, for themselves and their said tribes or nations, do hereby acknowledge themselves to be under the protection of the United States, and of no other power, state, or sovereignty whatever.

Article II

It is stipulated and agreed by the said tribes or nations, and their associate bands, that the United States shall have the sole and exclusive right of regulating trade and intercourse with them, and they do hereby respectively engage to afford protection to such persons, with their property, as shall be duly licensed to reside among them for the purpose of trade and intercourse, and to their agents and servants, but no person shall be permitted to reside among them as a trader, who is not furnished with a license for that purpose, under the hand and seal of the superintendent to be appointed by the President of the United States or such other person as the President shall authorize to grant such licenses, to the end that said Indians may not be imposed on in their trade; and if any licensed trader shall abuse his privilege by unfair dealing, upon complaint by the chiefs to their agents and proof thereof, his license shall be taken from him, and he shall be further punished according to the laws of the United States; and if any person shall intrude himself as a trader without such license, upon complaint he shall be dealt with according to law.

Article III

The United States reserves to itself the right of working such mines as may be found within the Indian territory, and the said tribes pledge themselves to protect such persons as the President of the United States may send among them for that purpose. In order to guard against the perpetration of frauds upon the Indians, under pretext of hunting and working mines, no person shall be permitted to go among them for that purpose, except by express license from the President of the United States.

Article IV

The said tribes and their associate bands agree to deliver, by the first day of November next, to the superintendent of Indian affairs to be appointed by the President, at such place as he may direct, due notice of which shall be given to the said tribes, all white persons and negroes who are now prisoners among any of the said tribes or nations, for which the United States agree to make to them a fair compensation; and

the United States further agree *to make* [that] all the prisoners taken from said tribes by Texas or the United States, shall be delivered up to the said tribes, at the same time and place, without charge. And when any member of any of said tribes or nations, and their associate bands, having in his possession an American prisoner or prisoners, white or black, shall refuse to give them up, the President of the United States shall have the privilege of sending among said tribes or nations such force as he may think necessary to take them; and the chiefs of the nations or tribes, parties to this treaty, pledge themselves to give protection and assistance to such persons as may be sent among them for this purpose.

* * * * *

Article VI

The said tribes and their associate bands pledge themselves to give notice to the agent of the United States residing near them of any designs which they may know or suspect to [be] formed in any neighboring tribe, or by any person whatever, against the peace and interests of the United States.

Article VII

It is agreed that, if any Indian or Indians shall commit a murder or robbery on any citizen of the United States, the tribe or nation to which the offender belongs shall deliver up the person or persons so complained of, on complaint being made to their chief, to the nearest post of the United States, to the end that he or they may be tried, and, if found guilty, punished, according to the law of the State or Territory where such offense may have been committed. In like manner, if any subject or citizen of the United States shall commit murder or robbery on any Indian or Indians of the said tribes or nations, upon complaint thereof to the agent residing near them, he or they shall be arrested, tried, and punished according to the law of the State or Territory where such offence may have been committed.

Article VIII

The practice of stealing horses has prevailed very much to the great disquiet of the citizens of the United States, and, if persisted in, cannot fail to involve both the United States and the Indians in endless strife.

It is therefore agreed that it shall be put an entire stop to on both sides. Nevertheless, should bad men, in defiance of this agreement, continue to make depredations of that nature, the person convicted thereof shall be punished with the utmost severity, according to the laws of the State or Territory where the offense may have been committed; and all horses so stolen, either by the Indians from the citizens of the United States or by the citizens of the United States from any of the said tribes or nations, into whose possession soever they may have passed, upon due proof of rightful ownership, shall be restored; and the chiefs of said tribes or nations shall give all necessary aid and protection to citizens of the United States in reclaiming and recovering such stolen horses; and the civil magistrates of the United States, respectively, shall give all necessary aid and protection to Indians in claiming and recovering such stolen horses.

Article IX

For the protection of said Indians and for the purpose of carrying out the stipulations of this treaty more effectually, the President shall, at his discretion, locate upon their borders trading houses, agencies, and posts. In consideration of the friendly disposition of said tribes, evidenced by the stipulations in the present treaty, the commissioners of the United States, in behalf of the said States, agree to give to the said tribes or nations goods as presents at this time and agree to give presents in goods to them to the amount of ----------, next fall, (a) at the Council Springs, on the Brazos, where this council is now held, or at some other point to be designated, and of which due notice shall be given to said tribes.

Article X

The said tribes or nations and their associate bands are now, and forever agree to remain, at peace with the United States. All animosities for past offences are hereby mutually forgiven and forgotten, and the parties to this treaty pledge themselves to carry it into full execution, in good faith and sincerity.

Article XI

And the said tribes and their associate bands are now, and agree to remain, friendly with such tribes as are

now at peace with the United States, residing upon the waters of the Arkansas, Missouri, and Red Rivers.

Article XII

If any person or persons shall introduce ardent spirits or intoxicating liquors of any kind among said tribes or nations, such person or *person* [persons] shall be punished according to the laws of the United States, and the said tribes or nations agree to give immediate notice to the agent of the United States residing near them, and to prevent by any means in their power the violation of this article of treaty.

ARTICLE XIII

It is further agreed that blacksmiths shall be sent to reside among the said tribes or nations, to keep their guns and farming utensils in order, as long and in such manner as the President may think proper. It is further agreed that school teachers, at the discretion of the President, shall be sent among the said tribes or nations for the purpose of instructing them; and the said tribes or nations agree that preachers of the gospel may travel or reside among them by permission of the President or his agents to be appointed, and that ample protection shall be afforded them in the discharge of their duties.

ARTICLE XIV

The said tribes or nations, parties to this treaty, are anxious to be at peace with all other tribes or nations, and it is agreed that the President shall use his exertions, in such manner as he may think proper, to preserve friendly relations between the different tribes or nations parties to this treaty, and all other tribes of Indians under his jurisdiction.

* * * * *

The only privilege accorded to plaintiffs herein relating to land by virtue of the treaties of 1835 and 1846 was the free permission to hunt and trap, together with several other much larger Indian nations and tribes, on the Great Prairie west of the Cross Timbers, to the western limits of the United States, as set forth in Art. 4 of the treaty of August 24, 1835, *supra*. No reference as to the location of any tribe on any designated land, or land relating to plaintiffs, other than the free permission to hunt and trap on the

Great Prairie is found in the treaty of August 24, 1835, upon which plaintiffs chiefly rely as a recognition by the United States of their undisputed and long-continued possession and occupation of the vast territory from about the 97th meridian on the east, the 100th on the west, the Canadian River on the north, and the Brazos River on the south.

3. Under Art. 9 of the treaty between the United States and the Choctaw and Chickasaw tribes of Indians concluded June 22, 1855 (11 Stat. 611, 613), the territory between the 98th and 100th meridians, the Canadian River on the north, and the Red River on the south was leased (afterward ceded) by the Choctaws and Chickasaws for the permanent settlement thereon of: "* * * the Wichita and such other tribes or bands of Indians as the government may desire to locate herein; excluding, however, all the Indians of New Mexico, and also those whose usual ranges at present are north of the Arkansas River, and whose permanent locations are north of the Canadian River, but including those bands whose permanent ranges are south of the Canadian, or between it and the Arkansas; * * *."

4. On March 30, 1859, the Acting Commissioner of Indian Affairs (Ann. Rept. Commr. Ind. Aff., 1859, pp. 264, 265), instructed the Superintendent of the Southern Superintendency, who had charge of the district leased from the Choctaws and Chickasaws, as follows:

> * * * fix upon a suitable location for the Wichitas, and make such an examination of the country as will enable you to determine upon the proper places for locating and colonizing the Texas and other Indians, which it is intended to place within that district. In carrying out this policy, the different bands, so far as they cannot be united, are to be located upon distinct reservations, with circumscribed limits, containing only as much land as may be necessary for their actual occupancy and use, * * *.
>
> * * * * *
>
> So soon as it may be practicable and safe for the Wichitas to remove to their new location, you will require them to go there, giving them to understand that is to be their permanent home. * * * The same understanding must be impressed upon the other Indians, * * *.

On September 20, 1859, the Superintendent reported as follows:

> In pursuance of instructions from your office * * * I selected, in the month of June last, reserves on the Fausse Wachita river, near the old Kechai village, and about forty miles northeast of the eastern extremity of the Wichita mountains, in the river valley, on the south side, for the Comanche and other Indians from Texas; and on the north side, between the river and Sugar Tree creek, for the Delawares and Caddoes, heretofore affiliated with the Wichitas or Ta-wai-hash; and for the latter, and the bands of Kechais affiliated with them, I selected a reserve on the Canadian, some twenty-five miles west of those on the Fausse Wachita. * * * Ann. Rept. Comm'r Ind. Aff., 1859, p. 165).

In 1872 certain chiefs and delegates of the Wichitas and affiliated bands entered into the following agreement with the Commissioner of Indian Affairs:

> ARTICLES OF AGREEMENT made and concluded at Washington City, District of Columbia, this 19th day of October, A. D. 1872, by and between Francis A. Walker, Commissioner of Indian Affairs, representing the United States, of the one part, and the undersigned chiefs, head men, and members of the Wichitas and other affiliated bands of Indians duly authorized to act for their people, of the other part, witnesseth:
>
> Article 1. The United States hereby give and grant to the said Wichitas and other affiliated bands, for a home, the tract of country bounded as follows, to wit: Commencing at a point in the middle of the main channel of the Wachita River where the 98th meridian of west longitude crosses the same, thence up the middle of the main channel of said river to the line of 98°40′ W. L., thence on said line of 98°40′ due north to the middle of the main channel of the main Canadian River, thence down the middle of said main Canadian River to where it crosses the 98th meridian, thence due south to the place of beginning.
>
> Article 2. In consideration of the reservation provided for in the preceding article the said Wichitas and other affiliated bands hereby cede and relinquish to the United States all right, title, interest or claim of any nature whatsoever in and to any lands in Texas, Louisiana, Indian Territory, or elsewhere within the limits of the United States.

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In his annual report for 1872 (p. 101) the Commissioner of Indian Affairs recommended the ratification of this agreement, but no action was taken by Congress upon this recommendation.

Although the agreement of October 19, 1872, entered into between the Commissioner of Indian Affairs and the petitioners herein was never ratified by the United States, the habitat of petitioners has ever since been within the territory described in Article 2 of said agreement.

5. Prior to 1859 the affiliated bands of the Wichita tribe and other Indians, including the Caddoes and certain of the Southern Comanches, lived in Texas near an agency established there for them by the United States. In August 1859, after Texas had been admitted as a state in 1845, great dissentions and difficulties arose due to the hostility of the citizens of Texas against the Indians; as a result, and for the safety and protection of the Indians, they were removed from Texas in August 1859, north of the Red River into the "leased district," and the affiliated bands of the Wichitas were placed upon the Wichita reservation and provision was made for the other Indians so removed. In the removal of these Texas Indians all of their movable property, except about five hundred head of cattle and horses, was removed with them. An effort was made to care for and protect the stock which the federal officers were unable to move with the Indians so as to be able, later, to sell or remove such stock. Due, however, to the hostility of the citizens and rangers of Texas they were unable to corral and move all the cattle and horses of the various Texas Indian tribes and bands. All the movable property of the Indians brought from Texas at the time of their removal was either delivered to the Indians or used, or sold, for their benefit. The houses and furnishings provided for the Indians removed to the reservation in the "leased district" upon which they were placed were equal to, or better than, the houses and furnishings which they were compelled to abandon in Texas. An aggregate appropriation of $121,260 was made for the Texas Indians removed, one of the purposes named being "For building houses in lieu of those abandoned in Texas" (12 Stat. 56) and this

designation was also in appropriation bills in succeeding years up to and including the year 1864. The amount appropriated for the Texas Indians was $22,825 and for the Wichitas $37,800, annually. At the time of removal, R. S. Neighbors, Superintendent of Indian Affairs in Texas, placed a total valuation of $7,900 on the houses formerly occupied by the Indians from which they were removed, and the record shows that a total of $9,717 was later expended for the building of houses for these Indians. After Superintendent Neighbors had removed the Indians and certain of their property he went back into Texas in an endeavor to remove the remainder, including stock, and was killed. The stock had become so far removed and scattered that it could not be found and corraled for removal.

Sometime in 1858 the Comanche Indians in the "Leased District" had, because of their warlike nature, been causing trouble to other Indians and officers of the United States. The Wichitas had endeavored to have the Comanches cease their warfare and make peace, and had invited the Comanches to assemble with them in their villages where the Wichitas were then located. While the Wichitas and Comanches were so assembled in friendly gathering, the troops of the United States through an unfortunate misunderstanding of orders of the Army officers and believing that they were acting in protection of the Wichitas and being unaware of the peaceful assemblage of the Comanches and Wichitas, fired upon the Comanches so assembled killing about fifty Comanches and two Wichitas who were among those in the Comanche assemblage. The Wichitas allege that the United States thereafter, because of the feeling of the Comanches against the Wichitas whom they suspected of being guilty of having a part in the unfortunate incident, quartered troops on plaintiffs' property, foraged upon, used, and damaged their property to the extent of a loss to the Wichitas of $30,000. The evidence shows that the incident mentioned did occur and that as a result of the feeling of the Comanches against the Wichitas the troops and horses quartered by the United States did forage to some extent, not disclosed by the record, upon the fields and other property of the Wichitas

and perhaps damaged or destroyed some of their crops, but there is no evidence of the extent of such use, damage, or destruction, or of the value of the property so used, damaged, or destroyed.

The Wichitas also make claim in their petition for $75,000 which they allege they were compelled to expend between 1892 and 1900 to defend their rights to the lands against the claim of the Choctaw and Chickasaw nations to compensation for the lands within the 1859 Wichita reservation within the "Leased District" and known as District No. 5, or the Wichita Reservation. With respect to this item, the facts show that section 14 of the Indian Appropriation Act, approved March 2, 1889 (25 Stat. 1005), provided for a commission to treat with the Cherokee and other Indians owning or claiming lands lying west of the 96th degree of longitude for the cession of their title, claims, or interest therein to the United States. In the spring of 1890 the commission visited the Wichita tribe and affiliated bands on their reservation and proposed that an agreement be made whereby the Wichitas would cede their entire reservation of 743,257.19 acres to the government and that each Indian be allotted one hundred and sixty acres of land within the reservation limits and that the government would pay them $286,000 for the land ceded, of which $53,000 was to be paid to the Indians equally, per capita, upon the approval of the agreement; $53,000 to be used for the benefit of the said Indians and their allotments and the balance of $180,000 to be placed in the Treasury for the benefit of the Indians at 4 percent interest. The sum proposed was about fifty cents an acre for the surplus lands over such acreage as was necessary to make the allotments but the Indians protested the price offered and insisted that the government should pay them $1.25 an acre, or $715,000. An agreement could not be reached and, as a result, the commission proposed that there should be an agreement executed in which all matters determined upon should be fully set down and the question of compensation for the surplus lands should be left to Congress, whose decision in the matter would be final and binding. This was agreed upon with the result that an agreement, known as the Jerome Agreement, was executed June 4, 1891,

and was ratified by the act of March 2, 1895 (28 Stat. 876, 896)—the fifth article of which was as follows:

> In addition to the allotments above provided for, and the other benefits to be received under the preceding articles, said Wichita and affiliated bands of Indians claim and insist that further compensation, in money, should be made to them by the United States, for their possessory right in and to the lands above described in excess of so much thereof as may be required for their said allotments. Therefore it is further agreed that the question as to what sum of money, if any, shall be paid to said Indians for such surplus lands shall be submitted to the Congress of the United States, the decision of Congress thereon to be final and binding upon said Indians; provided, if any sum of money shall be allowed by Congress for surplus lands, it shall be subject to a reduction for each allotment of land that may be taken in excess of one thousand and sixty (1,060) at that price per acre, if any, that may be allowed by Congress.

A new element was injected into the controversy between the United States and the Wichitas and affiliated bands as a result of a claim made in 1890 by the Choctaw and Chickasaw Indians that there had been no absolute cession of the "leased district" by the Choctaws and Chickasaws under the treaties of 1855 and April 28, 1866 (14 Stat. 769), upon which land the Wichita and affiliated bands had been given a reservation, but that such lands had been ceded in trust for the settlement of friendly Indians and that the allotment of these lands in severalty to these Indians and the sale of the surplus lands to white men would terminate the trust and that the Choctaws and Chickasaws would be entitled to compensation for such lands. When the agreement of June 4, 1891, *supra*, between the Wichitas and the United States came before Congress, that body passed an act conferring jurisdiction upon this court to determine and adjudicate the claims of the Choctaws and Chickasaws to title to the lands and the claim of the Wichitas with respect to the amount of compensation, if any, to surplus lands within their reservation. In this court (34 C. Cls. 17) and in the Supreme Court (179 U. S. 494), the Government opposed the claims of the Choctaws and Chickasaws and supported the claims

of the Wichitas to such compensation as the court might find for the surplus lands in their reservation. In the suit in this court the Wichitas also contended that because of Art. VI of the 1891 agreement they were entitled to compensation not only for surplus lands in their 1859–1872 reservation but that they were entitled to have adjudicated their claim for compensation for all the lands lying within the "leased district" for which claim is made in this present proceeding, on the ground that for two centuries they had held this territory under absolute possession and occupation.

Art. VI of the 1891 Agreement (28 Stat. 896) was as follows:

> It is further agreed that there shall be reserved to said Indians the right to prefer against the United States any and every claim that they may believe they have the right to prefer, save and except any claim to the tract of country described in the first article of this agreement.

This court considered and decided all the questions presented and held against the Wichitas on their claims and in favor of the Choctaws and Chickasaws on their claim that they were entitled to compensation for the surplus lands of the Wichita Reservation. On appeal, the Supreme Court held that the Choctaws and Chickasaws had absolutely ceded the territory embraced within the "leased district" to the United States and that the Wichitas were entitled to compensation for the value of the surplus lands within their reservation which they had ceded to the government under Art. I of the agreement of 1891. The Supreme Court further held that the jurisdictional act did not confer authority or jurisdiction to pass upon the claim of the Wichitas for compensation for any land outside the limits of their reservation of 743,257.19 acres. The record shows that in 1902, after the termination of the litigation in question, Congress made a reimbursable appropriation of $43,332.93 for the benefit of the Wichita tribe, as attorneys' fees, for counsel for these Indians and that this amount was paid and subsequently reimbursed out of funds belonging to the Indians. The record further shows that out of the Wichita Indian funds in the hands of the government, the amount of $756.04 was

disbursed for printing and typing of briefs and for filing fees. The Caddo Band of Indians in their intervening petition also make a similar claim for $25,000, separate and apart from the claim of the Wichitas. There is no record nor evidence to show that any sum was disbursed or expended by or for the Caddo Indians for attorneys' fees or otherwise in connection with the litigation mentioned.

6. Except in the setting apart of the Wichita Reservation and the agreement of June 4, 1891, no treaty or agreement has ever been made or consummated by and between the United States and the Wichita tribe and affiliated bands in respect of the exclusive use and occupancy by such tribe and bands of any particular designated area of land, and the United States has never at any time, except as abovementioned, acknowledged or recognized absolute possessory or occupancy rights of the Wichita tribe and affiliated bands, aboriginal or otherwise, to any lands within the territory for which they claim compensation in this suit.

The lands claimed by the Wichita tribe and affiliated bands herein are within the territory ceded in 1818 by the Quapaw tribe of Indians to the United States by treaty entered into in that year (7 Stat. 176). Art. 2 of that treaty delimits the tract so ceded and reserved as follows:

> * * * Beginning at the mouth of the Arkansaw river; thence, extending up the Arkansaw, to the Canadian fork, and up the Canadian fork to its source; thence south, to Big Red river, and down the middle of that river, to the Big Raft; thence, a direct line, so as to strike the Mississippi river, thirty leagues in a straight line, below the mouth of Arkansaw; together with all their claims to land east of the Mississippi, and north of the Arkansaw river, included within the coloured lines 1, 2, and 3, on the above map, with the exception and reservation following, that is to say: the tract of country bounded as follows: Beginning at a point on the Arkansaw river, opposite the present post of Arkansaw, and running thence, a due southwest course, to the Washita river; thence, up that river, to the Saline fork; and up the Saline fork to a point, from whence a due north course would strike the Arkansaw river at the Little Rock; and thence, down the right bank of the Arkansaw, to the place of beginning; which said tract of land, last above designated and

reserved, shall be surveyed and marked off, at the expence of the United States as soon as the same can be done with convenience, and shall not be sold or disposed of, by the said Quapaw tribe or nation, to any individual whatever, nor to any state or nation, without the approbation of the United States first had and obtained.

By Art. 1 of another treaty of November 15, 1824 (7 Stat. 232), the Quapaw Indians ceded to the United States all claim or title which they had in lands reserved to them by the terms of the treaty of August 24, 1818, *supra*. Ever since the treaty of 1818 with the Quapaws, the United States has claimed absolute title to all the territory described in this treaty between the Canadian River on the north and the Red River on the south and west to the 100th meridian. At the time of this treaty the United States had very little, if any, accurate knowledge or information with reference to the territory described in that treaty or with respect to any Indians, and particularly the Wichita tribe and affiliated bands, that might be living, roaming and hunting over such territory. There are no records available in the files or archives of the United States to show to what extent, if at all, the Quapaw Indians ever traversed, occupied, roamed, or hunted over any of the territory south of the Canadian River, north of the Red River, and west of the 97th meridian.

On October 18, 1820, by treaty (7 Stat. 210) between the United States and the Choctaw nation, the territory ceded in the treaty of 1818 with the Quapaw Indians was ceded by the United States to the Choctaws in exchange for the cession of that tribe of all of its lands east of the Mississippi River and, by a subsequent treaty of September 27, 1830 (7 Stat. 333), the western boundary of the territory ceded by the United States to the Choctaws was fixed as the western limits of the United States.

THE CADDO BAND OF INDIANS.

1. The Caddo Band of Indians in the State of Oklahoma was, in 1835, and for an indeterminate time prior thereto had been, inhabiting various areas within the territory that is now Louisiana, Arkansas, and Texas, but their principal

habitat was at all times within the old territory of Louisiana. The Caddoes were not the only occupants of this wide territory; other bands and tribes belonging to the same linguistic family had also resided there for centuries. With the acquisition of the Louisiana territory by the United States in 1803, immigration by white settlers increased and the Caddoes were forced from their old locations. Under the treaty concluded between the United States and the Caddo nation on July 1, 1835, and proclaimed February 2, 1836 (7 Stat. 470), the Caddoes ceded and relinquished to the United States all their rights and interest in and to the lands within the United States; in Art. II of this treaty they also agreed "to remove at their own expense out of the boundaries of the United States and the territories belonging and appertaining thereto within the period of one year from and after the signing of this treaty, and never more return to live, settle, or establish themselves as a nation, tribe, or community of people within the same." These Indians removed to Mexico, later Texas, where they remained until 1855 when a tract of land near the Brazos River in Texas was secured and they were induced to settle thereon. In 1859, as the result of trouble between the white settlers in Texas and the Indians there located, the Federal Government was appealed to and the Caddoes, with other Indians within that state, were, as hereinbefore stated, removed from Texas to the Washita River in Oklahoma and later were placed upon the Wichita reservation in the "leased district." In 1902 each member of the Caddo Band of Indians received an allotment of land and became a citizen of the United States and subject to the laws of Oklahoma. The population of this tribe was not large and in 1904 the band numbered 535.

Art. III of the Caddo treaty of July 1, 1835, *supra*, provided that in consideration for their cession, relinquishment, and removal, the United States agreed to pay said tribe $30,000 in goods, horses, and $10,000 in money within one year from the first day of September following the execution of the treaty and $10,000 per annum in money for the next four years following so as to make the whole sum paid and payable eighty thousand dollars.

The intervenors contend in their petition that the United States wholly failed to compensate them for any part of the eighty thousand dollars agreed to be paid; however, the undisputed facts show that, pursuant to the terms of Art. III of the treaty, Congress, by the act of June 14, 1836 (5 Stat. 36, 46), appropriated forty thousand dollars to carry "into effect the treaty made with the Caddo Indians" and during the period 1837 to 1840 a further sum of forty thousand dollars was likewise appropriated for "fulfilling treaties with the Caddoes," making a total of eighty thousand dollars appropriated, of which thirty thousand dollars was expended and disbursed for goods and horses which were delivered to the Caddo Band of Indians on July 3, 1835, and fifty thousand dollars was paid to the Caddo Indians in per capita cash payments.

WICHITA OFFSETS.

Section 2 of the jurisdictional act provides that the United States shall be allowed credit against any claim presented under such jurisdictional act that may be allowed "for all sums including gratuities heretofore paid or expended for the benefit of said tribes or any band thereof."

ITEM I

During the period from July 1, 1846, to June 30, 1924, there was expended for the direct benefit of the plaintiff tribes gratuitously by the United States, out of the appropriations made for the Indian Service generally and out of available funds, a total sum of $2,780,401.54, this amount being expended for the following purposes in the amounts stated:

Agricultural aid	$68, 414. 55
Agency buildings	22, 924. 14
Agency expenses	31, 028. 97
Burial of Indians	114. 10
Building material and hardware	31, 692. 44
Clothing	270, 155. 17
Expenses of Indian delegations	1, 246. 17
Education:	
Erection and repair of school buildings	138, 366. 82
School furniture and equipment	45, 611. 87
Manual training school supplies	2, 767. 23
Fuel and lighting	49, 129. 11
Provisions and clothing	212, 903. 73
Medical attention and supplies	1, 735. 22
Pay of superintendents and teachers	144, 158. 13

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Education—Continued.	
Pay of miscellaneous school employees	$213, 349. 48
Purchase, feed, and care of livestock	14, 740. 49
School farm, equipment, etc	29, 587. 28
Transportation of school supplies	20, 410. 52
Transportation of pupils	1, 041. 40
Board and tuition	42, 463. 72
Telephone service	183. 88
Household equipment	20, 344. 60
Indian dwellings	10, 389. 15
Livestock and work animals	34, 477. 89
Medical attention	29, 358. 42
Erection and repair of mills and shops	6, 064. 87
Tools and material for mills and shops	5, 544. 99
Pay of blacksmiths	8, 920. 26
Pay of mechanics	35, 150. 40
Pay of agents and subagents	31, 306. 02
Pay of interpreters	10, 316. 37
Pay of farmers	27, 501. 30
Pay of miscellaneous employees	132, 755. 07
Presents to Indians	21, 190. 73
Removal of Indians	24, 015. 89
Subsistence	951, 275. 54
Transportation of supplies	86, 827. 62
Depredations	2, 938. 00
Total	2, 780, 401. 54

ITEM II

During the period from July 1, 1846, to June 30, 1924, there was expended gratuitously by the United States for the benefit of the plaintiff tribes jointly with the Kiowa, Comanche, and Apache tribes of Indians the total sum of $2,898,978.65, this amount being expended for the following purposes in the amounts stated:

Agricultural aid	$49, 133. 95
Agency buildings	108, 828. 72
Agency expenses	30, 298. 05
Building material and hardware	4, 199. 71
Clothing	10, 024. 58
Household equipment	6, 628. 44
Indian dwellings	734. 30
Livestock and work animals	32, 375. 61
Medical attention	15, 322. 64
Erection and repair of mills and shops	2, 619. 82
Tools and material for mills and shops	5, 120. 42
Pay of mechanics	31, 323. 33
Pay of agents and subagents	45, 027. 14
Pay of interpreters	10, 441. 18
Pay and equipment of Indian police	156, 140. 85
Pay of judges, Indian courts	3, 879. 92
Pay of farmers	107, 469. 64
Pay of miscellaneous employees	195, 469. 33
Subsistence	1, 891, 946. 00
Transportation of supplies	191, 995. 02
Total	2, 898, 978. 65

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All of the above expenditures for the joint benefit of the Wichita tribe and affiliated bands of Indians, plaintiffs herein, and the Kiowa, Comanche, and Apache tribes of Indians were made during the period July 1, 1878, to June 30, 1924, when plaintiff tribes were attached to the Kiowa Agency, Oklahoma.

The following table shows the disbursements of this amount by fiscal years for the joint benefit of the Wichita tribe and affiliated bands of Indians and the Kiowa, Comanche, and Apache tribes; the population of the plaintiff tribes; total population of Indians at the Kiowa Agency, Oklahoma; percentage of the Wichita tribe and affiliated bands of Indians of the total population, and amount chargeable to the Wichita tribe and affiliated bands of Indians on a population basis:

Year	Wichita tribe and affiliated bands of Indians	Other Indians	Total population	Percent of Wichita tribe and affiliated bands of Indians of the total population	Amount disbursed	Amount chargeable to the Wichita tribe and affiliated bands of Indians
1879	1,112	2,846	3,958	0.280950	$32,782.24	$9,210.17
1880	1,082	2,886	3,968	.272681	168,688.51	45,998.15
1881	1,114	2,878	3,992	.279058	179,442.46	50,074.85
1882	1,126	2,923	4,049	.278093	191,419.88	53,232.53
1883	1,116	2,900	4,016	.277888	196,081.42	54,488.67
1884	1,121	2,842	3,963	.282867	174,168.12	49,266.41
1885	1,115	3,032	4,147	.268869	141,627.95	38,079.37
1886	1,094	3,088	4,182	.261597	170,033.07	44,480.14
1887	1,062	3,157	4,219	.251718	142,908.21	35,972.57
1888	982	3,033	4,015	.244583	99,820.26	24,414.34
1889	1,007	3,081	4,088	.246330	107,535.57	26,489.24
1890	1,057	3,064	4,121	.256491	99,092.34	25,416.29
1891	1,066	3,100	4,166	.255881	77,799.97	19,907.53
1892	996	2,786	3,782	.263353	75,353.71	19,844.63
1893	969	2,753	3,722	.260344	82,485.50	21,474.61
1894	969	2,833	3,802	.254866	101,535.04	25,877.83
1895	951	2,770	3,721	.255576	88,484.14	22,614.42
1896	932	2,819	3,751	.248467	90,087.56	22,383.79
1897	958	2,828	3,786	.253038	33,555.59	8,490.84
1898	961	2,872	3,833	.250717	29,188.30	7,318.00
1899	956	2,740	3,696	.258658	25,807.04	6,675.20
1900	925	2,808	3,733	.247790	67,819.82	16,805.07
1901	941	2,685	3,626	.259515	53,323.04	13,838.13
1902	956	2,705	3,661	.261131	55,018.73	14,367.10
1903	967	2,729	3,696	.261634	14,392.86	3,765.66
1904	961	2,715	3,676	.261425	37,161.63	9,714.98
1905	979	2,751	3,730	.262466	26,436.77	6,938.75
1906	992	2,782	3,774	.262851	26,830.52	7,052.43
1907	996	2,834	3,830	.260052	11,214.48	2,916.35
1908	1,006	2,880	3,886	.258878	16,715.27	4,327.22
1909	1,005	2,911	3,916	.256639	16,217.19	4,161.96
1910	1,021	3,007	4,028	.253476	14,318.46	3,629.39
1911	1,044	3,037	4,081	.255820	13,365.57	3,419.18

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Year	Wichita tribe and affiliated bands of Indians	Other Indians	Total population	Percent of Wichita tribe and affiliated bands of Indians of the total population	Amount disbursed	Amount chargeable to the Wichita tribe and affiliated bands of Indians
1912	1,064	3,110	4,174	0.254911	$11,377.86	$2,900.34
1913	1,078	3,136	4,214	.255814	11,607.05	2,969.25
1914	1,094	3,190	4,284	.255369	11,687.19	2,984.55
1915	1,123	3,200	4,323	.259773	14,937.72	3,880.42
1916	1,128	3,300	4,428	.254743	16,000.38	4,075.98
1917	1,124	3,343	4,467	.251623	24,761.43	6,230.55
1918	1,139	3,358	4,497	.253280	17,538.23	4,442.08
1919	1,134	3,354	4,488	.252674	20,329.00	5,136.61
1920	1,141	3,403	4,544	.251100	26,275.64	6,597.81
1921	1,152	3,472	4,624	.249135	19,813.12	4,936.14
1922	1,178	3,537	4,715	.249841	20,830.07	5,204.21
1923	1,201	3,563	4,764	.252099	22,265.83	5,613.19
1924	1,226	3,611	4,837	.253463	20,843.91	5,283.16
Total					2,898,978.65	762,900.09

ITEM III

During the period from July 1, 1865, to June 30, 1868, there was expended by the United States out of gratuity appropriations and for the benefit of plaintiff tribes jointly with other Indians a total sum of $994,486.05, of which amount $32,282.12 was disbursed for the benefit of plaintiff tribes herein, said amount being expended at the time plaintiff tribes were attached to concentration camps in Kansas under the Southern Superintendency, for the following purposes in the amounts stated:

Agricultural aid	$26,979.25
Agency expenses	2,194.01
Clothing	596,493.75
Medical attention	70.18
Pay of agents and subagents	1,332.37
Presents to Indians	38.00
Subsistence	365,113.80
Transportation of supplies	2,264.69
Total	994,486.05

All of the above expenditures for the joint benefit of plaintiff tribes and other Indians were made during the years 1866, 1867, and 1868 when plaintiff tribes were attached to refugee camps in the Southern Superintendency.

The following table shows, by fiscal years, the population

of Indians at the refugee camps in the Southern Superintendency during the period July 1, 1865, to June 30, 1866, as disclosed by the annual Report of the Commissioner of Indian Affairs; percentage of the Wichita Tribe and affiliated bands of Indians of the total population; the disbursement for the benefit of the Indians at said refugee camps of the sum above stated, and amount chargeable to the Wichita Tribe and affiliated bands of Indians on a population basis:

Year	Wichita tribe and affiliated bands of Indians	Other Indians	Total population	Percent of Wichita tribe and affiliated bands of Indians of the total population	Amount disbursed	Amount chargeable to the Wichita tribe and affiliated bands of Indians
1866	1,400	17,670	19,070	0.073414	$439,727.05	$32,282.12
1867			(a)		554,616.57	
1868			(a)		142.43	
Total					994,486.05	32,282.12

ITEM IV

During the period between December 1, 1911, and June 30, 1924, there was disbursed on behalf of the United States for the maintenance of the Anadarko Boarding School, Anadarko, Oklahoma, under other than treaty appropriations, a total sum of $270,547.79, of which amount $83,654.15 is chargeable as a gratuity against plaintiff tribes. The total of $270,547.79 was expended for the following purposes in the amounts stated:

Education:	
School furniture and equipment	$12,669.94
Manual training school supplies	111.32
Fuel and lighting	13,105.34
Provisions and clothing	86,902.80
Medical attention and supplies	302.52
Pay of superintendents and teachers	46,323.21
Pay of miscellaneous school employees	60,046.70
Purchase, feed, and care of livestock	25,500.56
School farm, equipment, etc.	13,247.96
Transportation of school supplies	5,517.63
Rent of St. Patrick's Mission School	6,633.33
Telephone service	186.48
Total	270,547.79

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The following table shows the amount of the disbursements made on behalf of the United States for the maintenance of the Anadarko Boarding School chargeable to the Wichita tribe and affiliated bands of Indians, as computed from information contained in the General Accounting Office Report herein:

Year	Attendance records			Percent of Wichita Tribe and affiliated bands of Indians	Amount disbursed	Amount chargeable to the Wichita Tribe and affiliated bands of Indians
	Wichita Tribe and affiliated bands of Indians	Other Indians	Total attendance			
1912	49	107	156	0.314102	$22,124.08	$6,949.22
1913	64	94	158	.405063	13,962.48	5,655.68
1914	40	78	118	.338983	18,701.82	6,339.60
1915	38	76	114	.333333	16,822.94	5,607.64
1916	44	102	146	.301370	16,076.98	4,845.12
1917	42	89	131	.320611	19,206.21	6,499.16
1918	40	103	143	.279720	24,229.42	6,479.56
1919	38	103	141	.269504	24,293.04	6,547.07
1920	39	84	123	.317073	24,862.25	7,883.15
1921	27	107	134	.201493	23,723.69	4,780.16
1922	32	107	139	.230216	21,702.69	4,996.31
1923	44	85	129	.341085	21,147.35	7,213.04
1924	57	80	137	.416058	23,694.84	9,858.44
Total					270,547.79	83,654.15

ITEM V

During the fiscal years 1880–1918, inclusive, there was disbursed on behalf of the United States for the maintenanca of the Carlisle Indian School, Carlisle, Pennsylvania, a total amount of $5,065,090.09, of which amount the sum of $62,770.05 is chargeable as a gratuity against the plaintiff tribes. The following table shows the amount expended yearly on behalf of the United States for the maintenance of the Carlisle Indian School, the number of members of plaintiff tribes in attendance at the school and the number of other Indians in attendance thereat; the percentage of students belonging to plaintiff tribes, the total amount disbursed annually, the amount chargeable each year to plaintiff tribes upon this basis, and the total amount chargeable to the Wichita tribe and affiliated bands of Indians:

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Year	Wichita tribe and affiliated bands of Indians	Other Indians	Total attendance	Percent of Wichita tribe and affiliated bands of Indians	Amount disbursed	Amount chargeable to the Wichita tribe and affiliated bands of Indians
1880	4	172	176	0.022727	$45,257.82	$1,028.57
1881	7	262	269	.026022	63,640.16	1,656.04
1882	9	283	292	.030822	67,877.97	2,092.13
1883	10	381	391	.025575	76,111.09	1,946.54
1884	9	476	485	.018557	79,791.77	1,480.70
1885	6	489	495	.012121	84,056.66	1,018.85
1886	5	534	539	.009276	86,961.65	806.66
1887	4	600	604	.006623	107,597.23	712.62
1888	3	580	583	.005146	95,666.57	492.30
1889	10	626	636	.015723	112,142.27	1,763.21
1890	13	728	741	.017544	96,792.67	1,698.13
1891	10	828	838	.011933	118,068.24	1,408.91
1892	9	825	834	.010791	136,213.55	1,469.88
1893	10	780	790	.012658	110,727.61	1,401.59
1894	8	739	747	.010710	108,567.38	1,162.76
1895	7	781	788	.008883	109,124.77	969.36
1896	7	793	800	.00875	105,523.63	923.33
1897	6	810	816	.007353	118,426.42	870.79
1898	4	893	897	.004459	115,293.23	514.09
1899	4	923	927	.004315	116,948.20	504.63
1900	3	1,043	1,046	.002868	154,492.27	443.08
1901	2	1,042	1,044	.001916	158,444.89	303.58
1902	1	1,071	1,072	.000933	155,292.34	144.89
1903	8	1,066	1,074	.007449	154,456.49	1,150.55
1904	10	1,060	1,070	.009346	161,187.29	1,506.46
1905	11	942	953	.011542	163,232.84	1,884.03
1906	11	990	1,001	.01989	156,541.95	3,110.49
1907	10	999	1,009	.009911	183,430.63	1,817.98
1908	13	992	1,005	.012935	166,401.26	2,152.40
1909	27	971	998	.027054	166,528.64	4,505.27
1910	23	990	1,013	.022705	173,861.11	3,947.52
1911	23	1,047	1,070	.021495	161,563.41	3,472.81
1912	21	831	852	.024648	159,277.57	3,925.87
1913	14	817	831	.016847	174,831.65	2,945.39
1914	4	804	808	.004950	173,155.12	857.12
1915	3	662	665	.004511	161,250.41	727.40
1916	5	540	545	.009174	161,767.73	1,484.06
1917	3	395	398	.007538	162,225.53	1,222.86
1918	3	147	150	.02	162,360.09	3,247.20
Total					5,065,090.09	62,770.05

ITEM VI

During the fiscal years 1910–1924, inclusive, there was disbursed on behalf of the United States for the maintenance of the Chilocco Indian School, Chilocco, Oklahoma, a total amount of $1,726,708.43, of which amount the sum of $79,423.59 is chargeable as a gratuity against plaintiff tribes. The following table shows the amount expended yearly on behalf of the United States for the maintenance of the Chilocco Indian School, the number of members of plaintiff

tribes in attendance at the school, and the number of other Indians in attendance thereat; the percentage of students belonging to plaintiff tribes, the total amount disbursed annually, the amount chargeable each year to plaintiff tribes upon this basis, and the total amount chargeable to the Wichita tribe and affiliated bands of Indians:

Year	Wichita tribe and affiliated bands of Indians	Other Indians	Total attendance	Percent of Wichita tribe and affiliated bands of Indians	Amount disbursed	Amount chargeable to the Wichita tribe and affiliated bands of Indians
1910	19	438	457	0.041575	$114,317.03	$4,752.73
1911	27	506	533	.050657	94,395.77	4,781.81
1912	27	526	553	.048825	93,913.95	4,585.35
1913	26	513	539	.048237	96,141.77	4,637.59
1914	17	550	567	.029982	95,477.25	2,862.60
1915	16	534	550	.029091	99,035.74	2,881.05
1916	20	518	538	.037175	98,821.34	3,673.68
1917	19	527	546	.034799	97,387.94	3,389.00
1918	30	531	561	.053476	116,032.10	6,204.93
1919	37	424	461	.080260	115,005.32	9,230.33
1920	25	482	507	.049310	144,935.19	7,146.75
1921	30	502	532	.056391	142,820.48	8,053.79
1922	30	568	598	.050167	124,249.34	6,233.22
1923	27	546	573	.047120	126,753.59	5,972.63
1924	22	712	734	.029973	167,421.62	5,018.13
Total					1,726,708.43	79,423.59

ITEM VII

During the fiscal years 1894–1924, inclusive, there was disbursed on behalf of the United States for the maintenance of the Haskell Institute, Lawrence, Kansas, a total amount of $4,803,978.43, of which amount the sum of $96,478.15 is chargeable as a gratuity against plaintiff tribes.

The following table shows the amounts expended yearly on behalf of the United States for the maintenance of Haskell Institute; the number of members of plaintiff tribes in attendance at the school and the number of other Indians and the total in attendance thereat; the percentage of students belonging to plaintiff tribes; the total amount disbursed annually, the amount chargeable each year to plaintiff tribes upon this basis; and the total amount chargeable to the Wichita and affiliated bands of Indians:

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Year	Wichita tribe and affiliated bands of Indians	Other Indians	Total attendance	Percent of Wichita tribe and affiliated bands of Indians	Amount disbursed	Amount chargeable to the Wichita tribe and affiliated bands of Indians
1894	15	641	656	0.022866	$83,720.21	$1,914.35
1895	13	495	508	.025591	76,274.74	1,951.95
1896	14	672	686	.020408	80,707.96	1,647.09
1897	15	607	622	.024116	77,673.02	1,873.16
1898	17	647	664	.025602	84,448.81	2,162.06
1899	9	678	687	.013100	117,162.87	1,534.83
1900	8	720	728	.010989	94,651.93	1,040.13
1901	8	905	913	.008762	131,840.64	1,155.19
1902	7	879	886	.007901	116,751.10	922.45
1903	16	956	972	.016461	192,933.71	3,175.88
1904	18	1,027	1,045	.017225	147,566.64	2,541.84
1905	11	786	797	.013802	145,935.39	2,014.20
1906	15	788	803	.018680	169,166.09	3,160.02
1907	18	970	988	.018219	163,155.71	2,972.53
1908	20	921	941	.021254	168,646.05	3,584.40
1909	17	766	783	.021711	165,362.95	3,590.20
1910	9	835	844	.010664	158,100.00	1,685.98
1911	6	759	765	.007843	150,556.82	1,180.82
1912	10	763	773	.012937	141,486.05	1,830.41
1913	24	788	812	.029557	145,586.27	4,303.09
1914	30	794	824	.036408	143,554.97	5,226.55
1915	30	744	774	.038760	157,033.73	6,086.63
1916	28	782	810	.034568	156,421.39	5,407.17
1917	25	838	863	.028968	150,753.63	4,367.03
1918	27	1,071	1,098	.024590	185,138.71	4,552.56
1919	24	997	1,021	.023506	193,458.91	4,547.45
1920	16	864	880	.018182	216,199.77	3,930.94
1921	15	738	753	.019920	262,472.62	5,228.45
1922	19	841	860	.022093	268,051.85	5,922.07
1923	16	823	839	.019070	222,526.39	4,243.58
1924	12	1,030	1,042	.011516	236,639.50	2,725.14
Total					4,803,978.43	96,478.15

Recapitulation of Offsets:

Under Item I	$2,780,401.54
Under Item II	762,900.09
Under item III	32,282.12
Under Item IV	83,654.15
Under Item V	62,770.05
Under Item VI	79,423.59
Under Item VII	96,478.15
Total	3,897,909.69

ADDITIONAL CADDO OFFSETS.

During the period January 1, 1831, to December 31, 1840, the United States gratuitously disbursed the sum of $2,894.22 for the direct benefit of the Caddo Band of Indians under other than treaty appropriations, this amount being expended for the following purposes and in the amounts stated:

Opinion of the Court

Agency expenses	$101.87
Pay of interpreters	2,040.00
Presents to Indians	545.42
Subsistence	206.93
Total	2,894.22

The court decided that the plaintiffs, the Wichita and Affiliated Bands of Indians in Oklahoma, the Towaconies, Wacos, Keechis, Ionies, and the Delaware Band of the Wichita Tribe, and the individual members of said Wichita and Affiliated Bands of Indians, and the intervenors, the Caddo Band of Indians, were not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The Wichita Tribe and Affiliated Bands of Indians and the Caddo Band, claiming to be an affiliate of the Wichitas, seek to recover $10,642,640.75 with interest at 5 percent per annum as a part of just compensation from various dates for the alleged taking by the United States, for itself and for other tribes and bands of Indians, of certain lands, moneys, and other property. This total is made up of (1) $6,354,543.75, as a principal sum at $1.25 an acre for 5,083,635 acres of land in Oklahoma (including the area in "Greer County" of 1,511,576 acres), extending from the Cross Timbers, somewhat east of the 98th meridian to the west of the Wichita Mountains and Antelope Hills, to the 100th meridian in the present state of Oklahoma; from the Canadian River on the north to the Red River on the south. The Wichita Reservation established and set apart in 1859 and 1872, otherwise known as District No. 5 in the "Leased District," comprising 743,257.19 acres is not included in the area claimed. Out of this total acreage of 5,083,635 the United States at various times set aside for schools and other purposes, or allotted to or sold for the benefit of the Cheyenne and Arapahoe tribes, 3,082,900 acres, and for the benefit of the Comanche, Kiowa, and Apache tribes it has set apart, sold, allotted, or given for school and other purposes 2,489,159 acres; "Greer County," of 1,511,576 acres, decreed by the Supreme Court to be a part of the United States, not

belonging to Texas, was subsequently opened for settlement at not less than $1.25 an acre; (2) $2,600,000 as the principal sum at 50 cents an acre for 5,200,000 acres of land in Texas from the Red River on the north to the Brazos on the south and from the 98th meridian, a location somewhat west, on the average, of Cross Timbers in Texas to the 100th meridian on the west; (3) for loss of property in Texas in 1859 upon removal of the affiliated bands of the Wichita tribe and the Caddo Indians from that state to the "leased district" in Oklahoma; and (4) $1,648,097.38 for net oil receipts arising from Red River oil lands and leases, and credited, paid to or expended for the benefit of the Comanche, Kiowa, and Apache Indians, which receipts arose from lands set apart for or allotted to these Indians within the territory which the Wichitas claim they previously possessed, owned, and occupied.

Section 1 of the Jurisdictional Act of June 4, 1924 (43 Stat. 366), under which this suit was instituted, provides that all claims of whatsoever nature which the Wichita and affiliated bands of Indians in Oklahoma may have against the United States may be submitted to this court for determination of the amount, if any, due said tribes or bands of Indians from the United States under any treaties, agreements, or laws of Congress, or for the misappropriation of any of the funds of said tribes or bands, or for the failure of the United States to pay said tribes or bands any moneys or other property due; and confers jurisdiction on this court, with the right of either party to appeal to the Supreme Court of the United States, to hear and determine as right and justice may require and upon a full and fair arbitration all legal and equitable claims, if any, of said tribes or bands against the United States and to enter judgment thereon.

Section 2 provides that the United States shall be allowed as an offset against any amount that may be awarded the Indians all sums, including gratuities, paid or expended for the benefit of the Wichitas or any band thereof.

Plaintiffs' claim in substance (1) that from time immemorial, and not later than about 1719, and with the assent and acknowledgement of all other Indian tribes and bands having any knowledge of them and of the country herein

claimed, they had as their habitat and range, and claimed, used, and occupied as their own for their fields, grazing, ranging, and hunting grounds, the region of country hereinabove described, comprising 10,283,635 acres in what is now Oklahoma and Texas, including the territory well known as the "leased district" and "Greer County," and that under the terms of Section 1 of the Jurisdictional Act this court is given full power to hear and determine this claim based on immemorial possession and occupancy, and to enter judgment thereon. (2) That the treaty of August 24, 1818 (7 Stat. 176), with the Quapaw Indians, who ceded to the United States the same territory herein claimed by plaintiffs and the compensation paid thereunder for the alleged cession of such territory, either in whole or in part, is not binding upon plaintiffs who were not parties thereto and does not preclude the plaintiffs from asserting and this court from entertaining jurisdiction and deciding that plaintiffs, in fact, were the Indians who at that time, and prior and subsequent thereto, possessed and occupied the territory in question. (3) That the possessory and occupancy title of plaintiffs has been recognized by the United States in treaties with it and that the rights of plaintiffs to assert their claims made herein were stipulated in Art. 6 of an agreement of June 4, 1891, with the United States, ratified March 2, 1895 (28 Stat. 876, 897). (4) That plaintiffs are entitled to an award against the United States of just compensation for lands and other property appropriated by Texas which they exclusively possessed and occupied, which exclusive possession and occupancy was recognized by other Indian tribes and by the United States and Texas.

We are of opinion from a consideration of the entire record and such information as can be obtained from the history of the plaintiff tribe and affiliated bands, including the Caddoes, and the information disclosed by the record with reference to other tribes and bands of Indians in the territory for which the petition here claims compensation as for a taking, that plaintiffs' claims, which in substance are based upon aboriginal occupancy plus recognition of the rights of the Indians by treaties between them and the

United States and agreement of the United States therein to protect plaintiffs in their rights of occupancy, cannot be sustained. A claim based solely upon aboriginal occupancy is, we think, not within the terms of Section 1 of the Jurisdictional Act. But, even if it should be held that the Jurisdictional Act confers authority to consider such claim, we are nevertheless of the opinion, from the record, that such a claim is not sustained by the record.

No useful purpose would be served by a detailed discussion and an attempt to reconcile the different theories of the origin of the Wichitas and affiliated bands. Their early history and wanderings, including the extent to which they lived upon, roamed, and hunted over the territory in question as shown by the record, have been succinctly set forth in the findings. These Indians appear to have roamed and hunted for many decades without any fixed habitation for any very considerable period of time over a vast extent of territory in and over which many Indian tribes and bands roamed and hunted, until the Wichitas became permanently settled on the Wichita Reservation of 743,257.19 acres in the State of Oklahoma and within the area for which compensation is otherwise claimed in this suit. The Wichitas and affiliated bands appear to have been a peaceful tribe of Indians and they have never been known to have engaged in war with the United States or with white settlers who met with them from time to time. Their maximum population of approximately 4,000 appears to have existed about 1719 when, as the record indicates, they were located somewhere near the Arkansas River at the mouth of the Canadian River. From that time until about 1835 when a treaty of peace was negotiated by the United States and entered into August 24, 1835 (7 Stat. 474), with the Wichitas, and other tribes and bands of Indians, the Wichita tribe and affiliated bands appear to have removed or to have been driven by wars with the Osage Indians westward to a point near the 100th meridian and south of the Red River. The population of the Wichita and affiliated bands was materially reduced from time to time during this period by wars and disease until they were found on the south and north banks of the Red River, at which time the population of the

Wichita tribe and its affiliated bands appears to have been between five hundred and a thousand. During this time, however, the Wichita and affiliated bands did not occupy the territory herein claimed or any very considerable portion thereof alone as, prior to 1833, some twenty-seven other tribes resided, roamed, and hunted over the territory between the Red River and the Canadian, as was pointed out and found as a fact by this court upon the claim made by the Wichitas in the case of *The Choctaw and Chickasaw Nations* v. *The United States and the Wichita and Affiliated Bands of Indians* (34 C. Cls. 17, 73). When the Wichita and affiliated bands reached the Red River in the western limits of the territory for which they herein claim compensation, the affiliated bands appear to have gone farther into the territory which is now Texas and lived there until they were removed from Texas to the north bank of the Red River in the "leased district" in 1859. The facts also show that the Wichitas also, for a time, resided and had their villages on the south bank of the Red River. After the treaty of peace of 1835, the Wichitas appear to have migrated back into the territory between the 98th and 100th meridian eastward to a point near Ft. Sill, somewhat west of the 98th meridian. Other tribes or bands of Indians also continued to occupy, roam, and hunt over that territory.

The evidence shows that wherever the Wichitas settled from time to time they established villages and constructed thatched houses or huts and the women members of the tribe engaged in agricultural pursuits to some extent and that the Wichitas traded in these agricultural products with other tribes and bands of Indians; that the male members of the tribe guarded the tribe against other Indians and went on buffalo hunts occasionally but not for very great distances as buffalo was plentiful in this territory. There is no evidence in this record to show, beyond mere conjecture, the extent of any territory within the large area now claimed by plaintiffs which they claimed, possessed, and occupied to the exclusion of and with the recognition of other tribes and bands of Indians who lived, roamed, and hunted within the area in controversy. The assertion of plaintiffs that they claimed as their own and exclusively possessed and occupied

this vast area or territory with the recognition and consent of other tribes and bands of Indians prior to and subsequent to the Quapaw treaty of 1818 and the Choctaw treaties of 1820, 1830, 1855, and 1866, is a conclusion for which we can find no substantial support in the record and can only be based upon conjecture. The available facts and history with reference to the territory here involved and of the plaintiffs and other tribes of Indians require the conclusion that plaintiffs did not exclusively possess and occupy this territory.

We do not deem it necessary to discuss at length the Quapaw treaty of 1818 other than to point out that this treaty purported to and did cede to the United States all the territory herein claimed by plaintiffs, and the United States has ever since that date acted upon that cession and asserted title thereunder to the lands in controversy as public lands to which all Indian title of occupancy had been extinguished. It seems clear, therefore, that unless some other treaty, agreement, or act of Congress subsequent to the Quapaw treaty has recognized or conceded possessory and occupancy title to the territory involved as being in the Wichita and affiliated bands, the Jurisdictional Act is not sufficiently broad in its terms to confer jurisdiction upon this court to award compensation to plaintiffs for this vast territory upon the basis of immemorial possession. Without express authority from Congress, or authority otherwise clearly indicated, the courts are bound to recognize treaties as lawfully made and as the supreme law of the land. *Sisseton & Wahpeton Bands of Sioux Indians* v. *United States* (58 C. Cls. 302); *Duwamish Tribe of Indians, et al.* v. *United States* (79 C. Cls. 530, 579); *The Crow Nation or Tribe of Indians of Montana* v. *United States* (81 C. Cls. 238); *Eastern or Emigrant Cherokees and Western or Old Settler Cherokees* v. *United States* (88 C. Cls. 452, 467). But, assuming that one of the purposes of the Jurisdictional Act was to authorize this court to allow a claim based on immemorial possession if supported by sufficient evidence, we are of opinion that the claim based on immemorial possession and occupancy is not sustained by the evidence and cannot be allowed. *The Choctaw and Chickasaw Nations* v. *United States*,

supra; The Assiniboine Indian Tribe v. *United States* (77 C. Cls. 347); *Coos* (*or Kowes*) *Bay*, *Lower Umpqua* (*or Kalawatset*) *and Siuslaw Indian Tribes* v. *United States* (87 C. Cls. 143). On this phase of the case, which was presented to, considered, and decided by this court in the "Leased District" cases (34 C. Cls. 17), *supra*, at page 73, this court said:

> No treaty of limits has ever been made with the Wichitas. If they were the substantial people in the early days they now claim to have been, the omission to treat with them is remarkable. If the United States did not favor the peaceful and friendly tribe having some permanent abode, it was not because there was any desire to establish friendly relations with wandering savages at the expense of those willing to aid the pioneer whites in civilizing the country.
>
> During the times the French, Spanish, Mexican, and Texas governments had dominion over the tribe the Wichitas were not recognized as aboriginal possessors of the soil. Ignored for two centuries by the political departments of five governments, how can the judiciary now establish limits of territorial occupation for them without something more specific than what we have to tell where their limits began and where they ended in that vast region known as the Great Prairie west of the Cross Timbers?
>
> We find as a fact that even if the Wichitas occupied any portion of the prairie they did not do so alone. Their claim, then, cannot be considered an exclusive claim. Prior to 1833 twenty-seven other tribes resided between the Red River and the Canadian. And some six years before the removal of the Wichitas to their present reservation the Northern Comanches and Kiowas were reported as numbering 18,950, while the Southern Comanches were placed at 1,000 in number. (Report Actg. Supt. Howard, 1852.) Whatever their number in the eighteenth century, these last three bands roamed over the prairies and were certainly as much prairie Indians as any others. They were more numerous than the Wichitas, and, making greater use of the prairie, were more entitled to be called prairie Indians.
>
> Which of these tribes was first on the prairie does not clearly appear, but as the entire region was used indiscriminately by the various bands, and all were there in common from time to time, one insignificant band cannot now be deemed to have held the only original occupation of the country.

Opinion of the Court

The failure of the Wichitas is greater still to show and establish occupancy ahead of others to the reservation in suit, in the sense of Indian occupation, until a date comparatively recent. It is quite probable that from time to time they passed over it while roaming over other parts of the country north of Red River, but it is doubtful if their claim to the reservation would ever have been given life but for the act of the Government in quartering them upon it after the Choctaw lease of 1855. * * *

The Court would be lost in the realms of conjecture in attempting to reconcile the different theories of the origin of the Wichitas. One of their traditions places the main tribe on the Neosho River, in Kansas, about 1781, from whence two bands left the main tribe, one taking up a residence in Texas and the other locating near the present town of Wichita in Kansas. Modern reports class them as Wacoes and Towaconies, and virtually one people. The three tribes speak the same language, and those Wichitas prosecuting the present claim presumably came out of Texas. The Wacos and Towaconies lived there beyond the prairies and pretend to nothing in the way of an interest in the land except under recent agreement.

We deem it unnecessary to pursue the inquiries into this branch of the case further. The main issues have been presented. The labyrinth of detail, if fully stated, would but serve to encumber the record. Our conclusion concerning the matter of occupation is that the Wichitas have not established such an occupancy of the land in suit at the time of its acquirement by the United States as would support the customary Indian title, or possession of such character that the United States can now recognize or is under obligation to protect for purposes of compensation.

Upon appeal by all the parties in the "Leased District" cases, *supra*, the Supreme Court held that the jurisdictional act in that case would not allow a presentation of a claim by the Wichitas to the entire "leased district" and limited review to the claim of the Choctaws and Wichitas to the proceeds from sale of the surplus lands in the Wichita reservation of 743,257.19 acres. Thereupon this court entered judgment in favor of the Wichitas and affiliated bands for $675,371.91 which was paid.

Opinion of the Court

The evidence and information upon which this court in the *Leased District cases* passed upon the question now presented is, for the most part, the evidence and information upon which plaintiffs rely in this proceeding. Upon the evidence then before the court and upon such additional evidence and information as has been submitted by plaintiffs in this proceeding, we now affirm the holding of this court on this phase of the case for the reasons then stated by the court. Such additional evidence as has been submitted in this proceeding does not warrant a different conclusion.

In *Assiniboine Indian Tribe* v. *United States*, *supra*, the jurisdictional act, as amended, specifically conferred jurisdiction and authority to adjudicate and render judgment on a use and occupancy title by immemorial possession. This court held that a claim to title to lands based on immemorial possession could not be sustained where the evidence showed that other tribes similarly occupied and possessed such territory. In *Coos Bay Tribe of Indians case*, *supra*, the jurisdictional act also specifically authorized jurisdiction and entry of judgment upon the claim "arising under or growing out of the original Indian title, claim, or rights of the said tribe * * *." At pages 152–153, this court said:

> * * * the United States never recognized the plaintiff Indians as the aboriginal owners of the lands they now claim. What the United States did with respect to their existing status was done under its plenary authority over tribal Indians, their lands and funds. The United States consummated no treaty relationship with them and until the agreement of October 31, 1892, *supra* [28 Stat. 286, 323], recognized no existing rights of property to any specific area of lands to be vested in them. * * *
>
> To establish Indian title to a vast acreage of lands by oral testimony, irrespective of the obstacles of establishing it by any other method, exacts a degree of proof sufficient to overcome contemporaneous documentary and historical evidence to the contrary. No doubt exists that the plaintiff Indians originally did reside upon the Coast Reservation with the other tribes thereon; how long they continued this residence and what particular portion thereof was concededly theirs are impossible of ascertainment.

With respect to plaintiff's claim that their possessory and occupancy title was recognized in treaties with the United States, it appears that prior to 1872 the United States had entered into only two treaties with plaintiffs, the first being the treaty of August 24, 1835, *supra*, and the second, the treaty of May 15, 1846 (9 Stat. 844). The first treaty of 1835 was entered into for the purpose of establishing and perpetuating peace and friendship between the United States and the Comanche and Wichita nations, and their associated bands or tribes of Indians, and between these nations or tribes and the Cherokee, Muskogee, Choctaw, Osage, Seneca, and Quapaw nations or tribes of Indians, and there was no cession of any land involved therein. We think it is clear from the provisions and purposes of this 1835 treaty that there was no recognition of title, possessory or otherwise, accorded by the United States to any Indian tribe party to the treaty. In *Blackfeet et al., Tribes of Indians* v. *United States* (81 C. Cls. 101), this court held that the rule for construction of treaties between Indians and the government most favorable to the Indians does not extend to the point of permitting the court to indulge in presumptions and implications of assumed obligations by the government where the attendant facts and circumstances clearly negative any intention on the part of the government to assume such obligations.

Plaintiffs contend, however, that under Art. 4 of this treaty, which provided that "It is understood by all the nations or tribes of Indians, parties to this treaty, that each and all of the nations or tribes have free permission to hunt and trap in the Great Prairie west of the Cross Timbers, to the western limits of the United States," the United States recognized the lands in question as being in plaintiffs and allege that this treaty recognized the habitat of petitioners and their settlements and hunting grounds as in the petition set forth. When considered in its entirety we cannot so interpret the treaty. As was said by this court in respect of this treaty in its opinion in the "Leased District" cases, *supra*, at page 81, "But if the treaty of 1835 be considered an admission of Wichita occupation it must also be considered with that of 1837 as an admission of Osage, Quapaw,

Seneca, Comanche, Muskogee, and Cherokee occupation. Neither treaty appears to us as an admission of title in favor of any tribe."

The second and final treaty consummated between the United States and plaintiffs was that concluded at Council Springs, Texas, on May 15, 1846, proclaimed March 8, 1847, *supra*, between the Comanche, Ioni, Anadaca, Cadoe, Lepan, Longwha, Keechy, Tahwacarro, Wichita, and Wacoe tribes of Indians and their associate bands. A consideration of the provisions of this treaty fails to reveal any provision that may be considered a recognition on the part of the United States of Indian title in any land as belonging to plaintiffs. This treaty appears to have been entered into for the purpose of having the Indians acknowledge themselves to be under the protection of the United States and under no other power, state, or sovereignty. For the reasons stated, we are of opinion that plaintiffs are not entitled to recover compensation for any of the lands in question under the terms of either of these treaties.

The record shows that with the exception of a portion of the Wichita tribe proper, its affiliated bands, the Towaconies, Wacos, Keechis, Ionies, and Delawares were at the time of the admission of Texas as a state in 1845, and for many years prior thereto, inhabitants of territories which at various times in the past had been under the dominion of France, Spain, and Mexico, and the republic of Texas. It is upon this residence of the affiliated bands that plaintiffs base their claim to the 5,200,000 acres of land in Texas. We think it is clear that this claim cannot be sustained. All public lands within the borders of Texas remained, upon its admission as a state, property of the State of Texas and the government of the United States has never at any time had title to or claimed any public lands in that state. Texas had made certain treaties with the Indian tribes within its borders, but we need not discuss those treaties here. When the Indians were removed by the United States from Texas for their own protection and safety, the reservation in that state formerly occupied by them became the property of the State of Texas and the lands within those reservations were added by Texas to its public domain. The citizens of Texas

were responsible for the removal of the affiliated bands to Oklahoma, as shown by the annual report of the Commissioner of Indian Affairs, 1859. In these circumstances the United States cannot be held liable to compensate these Indians for the loss of their lands in the State of Texas, in and to which the United States had no right, title, or interest before or after the Indians were compelled to abandon them.

With respect to the claim for $40,000 as the value of other property, such as houses and stock lost by the Indians upon their removal from Texas, we are of opinion from the facts disclosed by the record that plaintiffs cannot recover on this claim. The record shows that the United States and its agents did everything they reasonably could to remove from Texas, with the Indians, all of their movable property, and that this was accomplished with the exception of about five hundred head of horses and cattle. The facts do not show the value of this stock but they do establish that every effort which could be reasonably expected of the United States was made to corral and remove the stock but that this could not be done without the loss of life. The record shows that the Supervising Indian Agent of Texas Indians, Robert S. Neighbors, lost his life by reason of his efforts to protect the Texas Indians and to save their property. With respect to the value of the houses in Texas, which is included in this item of the claim, the facts show that these Indians upon their removal from Texas into the "Leased District" north of the Red River were furnished houses by the United States equally as good if not better, and of a greater value, than those which they were compelled to abandon in Texas.

The claim for recovery of the amount alleged to have been expended by plaintiffs and the intervenors in prosecuting their rights in the former litigation between the Choctaw and Chickasaw nations and the United States appears to have been abandoned. In any event, it seems clear that no recovery can be had on this item of the claim for the reason that such an amount as was expended was for the payment of compensation to attorneys employed by the Indians and for typing and printing costs for which the United States cannot be held liable.

Syllabus

Plaintiffs make objection to certain of the expenditures by the defendant claimed as offsets on the ground that they were not expenditures properly chargeable against the tribes or bands, as such, but in view of our conclusions that plaintiffs and the intervenors are not entitled to recover on any of the main issues in the case, it is unnecessary to discuss these objections to the nontreaty and gratuity expenditures set up by the defendant as an offset or credit.

The petitions are dismissed. It is so ordered.

WHITAKER, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

AMERICAN MAIZE PRODUCTS COMPANY v. THE UNITED STATES

[No. 43018. Decided November 6, 1939. Plaintiff's motion for new trial overruled January 8, 1940.]

On the Proofs

Income tax; claim for refund of taxes paid after expiration of statutory limitation period.—Where taxpayer, on February 24, 1927, addressed to the Collector of Internal Revenue a letter referring to a newspaper interview with the Collector, and requesting that the Collector make out claim for refund of additional income tax for 1918 paid on November 3, 1924, it is held that such letter did not constitute a timely claim for refund of taxes paid after statutory limitation period had expired, but was an informal claim based alone on possible payment of tax after expiration of period of limitations.

Same; amendment to informal claim.—Where taxpayer filed subsequent claims for refund which were based upon its right to special assessment under sections 327 and 328 of the Revenue Act of 1918, it is held that such claims were new and independent claims for refund and can not be considered as valid amendments of the former informal claim filed within statutory period based on possible payment of taxes after expiration of statute of limitations and hence were properly denied. *U. S.* v. *Andrews*, 302 U. S. 517, cited.

The Reporter's statement of the case:

Mr. Richard S. Doyle for the plaintiff.

Mr. J. H. Sheppard, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

This is a suit to recover the sum of $18,580.37, with interest, based upon an alleged redetermination of the taxpayer's liability by the Commissioner.

Two questions are presented: (1) whether or not claim for refund was timely filed; and (2) whether or not the action taken by the Commissioner amounted to a redetermination of plaintiff's tax liability.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff is a corporation organized under the laws of the State of Maine. It is engaged in the manufacture of corn syrups, corn starches, and other articles from corn by what is known as the wet milling process.

2. On March 15, 1919, plaintiff filed a "Tentative Return and Estimate of Corporation Income and Profits Taxes and Request for Extension of Time for Filing Return" for the year 1918. The return showed an estimated tax liability of $750,000, of which $250,000 was remitted with the return. An extension of time of 45 days was requested for filing plaintiff's return on the following ground: "Inability to obtain form of return required to be filed as final return."

3. On June 16, 1919, plaintiff filed a final 1918 income and profits tax return pursuant to the provisions of the Revenue Act of 1918, which return showed a net income of $2,001,-308.27. Plaintiff did not compute the tax upon the net income shown in the return, but attached to and made a part of that return an application to the Commissioner to have its profits taxes determined under the provisions of sections 327 and 328 of the said Act, and computed the instalments in the first instance upon the basis of a tax equal to 50 per centum of the net income as required by Section 328. On December 15, 1919, plaintiff paid the

final instalment of tax, $250,654.14, the total payments of which, $1,000,654.14, equaled 50 percent of the net income shown upon the return.

Attached to the aforesaid return was an application for special assessment signed by the treasurer of plaintiff, such application being predicated on alleged abnormal conditions affecting its capital and income and the exceptional hardship which would be imposed upon plaintiff as evidenced by the gross disproportion between the tax computed without the benefits of sections 327 and 328 of the Revenue Act of 1918 and the tax computed by reference to representative corporations.

4. The aforesaid application for special assessment was allowed by the Commissioner of Internal Revenue, and on October 17, 1923, he addressed a letter to the plaintiff, advising it of this allowance and asserting a tax liability for the year 1918 in amount of $1,382,467.02. In response to this letter, the plaintiff on November 16, 1923, wrote a letter to the Commissioner, requesting a conference before the Income Tax Unit and also before the Committee on Appeals and Review. In this letter it enclosed an appeal in which exceptions were taken to the proposed assessment upon the grounds that the average profits taxes paid by corporations engaged in the same or similar business was much lower than the taxes proposed in said assessment. On December 28, 1923, plaintiff filed with the Commissioner of Internal Revenue an affidavit in support of its appeal from and exceptions to the proposed assessment, and continued until July 10, 1933, to press its claim for a redetermination of its tax liability under sections 327 and 328.

5. Subsequently the Commissioner redetermined the plaintiff's tax liability for the year 1918 under the provisions of sections 327 and 328 of the Revenue Act of 1918 and advised the plaintiff by a so-called 60-day letter dated June 26, 1924, of a proposed assessment of $1,302,658.07. The letter further advised plaintiff:

> If you acquiesce in this determination and do not desire to file an appeal, you are requested to sign the enclosed agreement consenting to the assessment of the deficiency * * *.

By letter dated August 20, 1924, plaintiff transmitted to the Commissioner the agreement referred to, both the letter of transmittal and the agreement specifying that as the plaintiff had already paid $1,000,654.14, it should only be billed for the difference between that amount and the tax assessed, or $302,003.93.

Under the agreement the taxpayer waived the right of appeal to the Board of Tax Appeals and consented to the immediate assessment of the deficiency.

6. The plaintiff and the Commissioner had, on January 3, 1924, agreed to an extension of the statutory period of limitation for the determination, assessment, and collection of plaintiff's tax for the year 1918, and on October 13, 1924, the aforesaid tax of $1,302,658.07 was duly assessed and satisfied as follows:

Mar. 20, 1919	$250,000.00
June 18, 1919	250,000.00
Sept. 16, 1919	250,000.00
Dec. 16, 1919	250,654.14
Nov. 3, 1924	302,003.93
	1,302,658.07

7. On February 24, 1927, an article appeared in the New York Times, the first paragraph of which reads as follows:

> Frank K. Bowers, Collector of Internal Revenue, said yesterday that he intended to make out "abatement claims" and send checks as quickly as possible to taxpayers entitled to refunds for back taxes as a result of Monday's decision by the United States Supreme Court, holding that the Government has no right to seize the property of taxpayers in "distraint" proceedings in cases where the taxpayers are protected by the statute of limitations against ordinary court proceedings for the collection of back taxes. The collector said he did not intend to wait for taxpayers entitled to refunds to send in their claims.

The rest of the article deals with the number of cases involved, suggests that the refunds might run into millions, and gives the Collector's view of the law applicable.

Mr. Bowers was the Collector for the 2nd district of New York.

8. On February 21, 1927, the Supreme Court of the United States had decided the case of *New York and Albany Lighterage Co.* v. *Bowers*, 273 U. S. 346, and that was the case to which Collector Bowers referred in the article referred to in the preceding finding. This article was read by the treasurer of plaintiff who did not know anything about the *New York and Albany Lighterage Company* case, and did not know to which case the article in the New York Times referred.

On February 24, 1927, the treasurer of plaintiff addressed a letter to Collector Bowers, which reads as follows:

> We noted your interview in the New York Times today, in which you stated you would make refunds to taxpayers for back taxes paid after the Statute of Limitations had expired.
>
> We paid on May 14th, 1923, an additional tax of $92,311.21 for the year 1917; we also paid on November 3rd, 1924, an additional tax of $302,000.07 for the year 1918. We wish to make claim for the refund of these amounts, if due us.
>
> Inasmuch as you offer to file these claims for taxpayer, we request that you make out claims for refunds of the above amounts, should this come under the Court's decision to which you refer.

9. On January 31, 1929, the plaintiff wrote a letter to the Commissioner of Internal Revenue, the pertinent paragraphs of which read as follows:

> Application is hereby made that the case of this taxpayer for the year 1918 be given reconsideration in respect to the determination of the excess profits tax under the provisions of Sections 327 and 328 of the Revenue Act of 1918.
>
> The basis of this request is that the rate of excess profits tax as now assessed is so high, being 59.88% of the net income, and that the relief so far granted has only slightly mitigated the hardship imposed on the corporation by reason of the large amount of taxes it had to pay. Furthermore, the abnormal conditions were so apparent and of such magnitude that the Bureau readily recognized that this was a typical case falling within the purview of Section 327 and that the only method of determining the tax on a basis that could approximate equity was by a comparison with

other concerns as prescribed in Section 328. However, attention is called to the fact that this determination of tax liability was made in 1924, at a time when many of the corporation returns had not been finally audited and the comparative statistics therefore not always accurate. For these reasons it is firmly believed that a survey of the situation in which this taxpayer is now placed will disclose that the taxes now assessed are above the average of the few concerns who may be considered comparable.

* * * * *

In view of these facts the request is respectfully made that the case of this taxpayer be given reconsideration for the purpose of adjusting the excess profits tax liability to such an extent as will result in a more equitable determination and relieve this company of part of the burden of taxes under which it is now placed.

This application is made under the general provisions of T. D. 4235 and a conference is respectfully requested.

10. Plaintiff wrote other letters to the Commissioner of Internal Revenue on February 18, 1929, on March 26, 1929, and on April 13, 1929. These letters contained the names of a number of companies engaged in like business as plaintiff to be employed in determining the rate of excess-profits tax for the year 1918 under sections 327 and 328, and the last letter forwarded letters from the companies addressed to plaintiff relative to their invested capital and the amount of excess-profits tax paid by them for the year 1918.

11. On April 18, 1929, plaintiff filed a formal claim for refund for the year 1917 in the amount of $92,311.21, assigning as reasons therefor that payment was made on May 14, 1923, which was after the statute of limitation had expired. This claim was allowed in full in the amount of $92,311.21 plus $36,766.41 interest, which was refunded to plaintiff on January 13, 1930. In allowing this claim the Commissioner of Internal Revenue considered the letter of February 24, 1927, referred to in finding 8, as an informal claim for refund for the year 1917.

12. On April 18, 1929, plaintiff also filed a claim for refund for the year 1918 in the amount of $500,000, assigning as reasons in support thereof the following:

> This taxpayer corporation filed its application for the assessment of its excess-profits tax for the year 1918 under Sections 327 and 328 of the Revenue Act of 1918 well within the regular five-year statutory period.
> To conform with Treasury Decisions numbered 4265 and 4266 this Form 843 refund claim is being filed with the Collector of Internal Revenue.
> The 1918 special assessment claim is now having consideration by the Deputy Commissioner of the Income Tax Unit at Washington, D. C.

13. On April 21, 1930, the Commissioner of Internal Revenue wrote plaintiff a letter which reads as follows:

> Reference is made to your letters dated January 31, 1929, February 18, 1929, March 26, 1929, and April 13, 1929, in which you request, under the provisions of Treasury Decision 4235, the reopening of the 1918 case of the American Maize Products Company, New York, New York.
> In this connection it is noted that a claim for refund was not filed by this taxpayer within the period of limitations provided by the Revenue Act of 1926 for the filing of valid claims for refund and since the provisions of Treasury Decision 4235 are applicable only to the reopening of rejected claims for refund consideration of the case under the above-mentioned decision is unwarranted.
> Your request for reopening the above-mentioned case is, therefore, denied.

14. On April 21, 1930, the Commissioner of Internal Revenue wrote plaintiff a letter which reads as follows:

> Reference is made to your claim for refund of $500,000.00 filed on April 18, 1929, in connection with an income and profits tax return for the calendar year 1918.
> From an examination of the record in the file it is noted that the claim was filed under the provisions of Treasury Decisions 4265 and 4266 for the purpose of perfecting an alleged informal claim for refund consisting of an application for assessment of profits taxes

under the provisions of Sections 327 and 328 of the Revenue Act of 1918.

It is also noted that the application for special assessment was filed prior to the date of payment of the amount of tax found due upon an audit of your return, and that a formal claim for refund was not filed within four years of the date the tax was paid.

In view of the foregoing the conclusion has been reached that the application for special assessment may not be held to be an informal claim for refund, and that the formal claim for refund filed on April 18, 1929, may not be considered upon the merits for the reason that it was filed subsequent to the expiration of the statutory period of limitations provided by the Revenue Act of 1926 for the filing of valid claims for refund.

Your claim for refund of $500,000.00 will, therefore, be rejected on the next schedule to be approved by the Commissioner.

This claim was rejected on a schedule dated May 6, 1930, and the plaintiff was duly advised thereof.

15. On May 20, 1932, plaintiff filed a claim for refund for the year 1918 in the amount of $500,000, and under the reasons assigned in support thereof, the first paragraph reads as follows:

This claim hereby formally executed on Treasury Form 843 completes, amends, and amplifies taxpayer's claim for refund filed by this taxpayer with the Collector of Internal Revenue at New York City on February 24, 1927, which said claim was timely filed with said Collector, being so filed within 4 years from the date of payment of the assessment for 1918 taxes, which was made and listed on October 1924 List, page O, line 6, and which said payment on said assessments were made on November 3, 1924, in the amount of $1,302,658.07. The said claim for refund filed as aforesaid on February 24, 1927, was a claim for refund of taxes for the years 1917 and 1918, and the said claim was considered and allowed for the year 1917 by the Commissioner, and refund was made accordingly for the year 1917. The said claim for refund, filed as aforesaid on Feb. 24, 1927, for the year 1918 has never been considered, allowed, or rejected by the Commissioner of Internal Revenue.

Then follow arguments and citation of authorities in support of plaintiff's contention.

16. On July 25, 1932, plaintiff filed a further claim for refund for the year 1918 in the amount of $500,000, as a second amendment to its alleged claim for refund filed February 24, 1927. This claim, filed July 25, 1932, is in all respects the same as the claim referred to in the preceding finding, except for an additional allegation that the rates used by the Commissioner of Internal Revenue in the determination of plaintiff's profits tax in 1924 under sections 327 and 328 were incorrect.

17. On July 11, 1932, plaintiff's attorneys had a conference with the Commissioner of Internal Revenue relative to the redetermination of plaintiff's tax liability for the year 1918 under the provisions of 327 and 328 of the Revenue Act of 1918. At that time both the question of plaintiff's right to a redetermination of tax liability and the sufficiency and timeliness of its claim for refund were discussed. The Commissioner gave direction to the proper official to make a recomputation of plaintiff's tax liability for the year 1918 under the provisions of sections 327 and 328 of the Revenue Act of 1918 and report the result to him.

As a result the Commissioner reconsidered and redetermined plaintiff's tax liability under Special Assessment and determined an overassessment and overpayment of $18,580.17. The Commissioner officially and personally orally advised plaintiff, through its counsel and attorney in fact, of the determination of this overpayment and officially and personally advised plaintiff, through its counsel and attorney in fact, that the only thing left to discuss in the case was the question of the sufficiency of the refund claim. The defendant admits that if plaintiff is entitled to recover the correct overpayment is $18,580.17.

18. After the sufficiency of the claims for refund was considered, the Commissioner of Internal Revenue on July 10, 1933, wrote the plaintiff a letter, which reads as follows:

> Your claims for refund of $500,000.00 income and profits taxes for the calendar year 1918 have been examined and will be rejected for the following reasons:

Opinion of the Court

The claims were filed on May 20 and July 25, 1932, subsequent to the expiration of the period of limitations for filing valid claims for refund prescribed by Section 284 of the Revenue Act of 1926. The allowance of the refund requested is prohibited by the provisions of that section.

The claims purport to amend and amplify an alleged informal claim for refund filed with the Bureau on February 24, 1927; however, the period provided by Treasury Decision 4266 for the perfection of informal claims for refund filed within the period of limitations expired on May 1, 1929. Accordingly, the filing of the claims during 1932 failed to meet the requirements of T. D. 4266.

In addition the records of the Bureau disclose that a similar claim for refund, based on the special assessment issue and purporting to perfect an informal claim for refund, was filed on April 26, 1929, and was rejected by the Bureau on a schedule dated May 6, 1930.

It is held that the rejection of the formal claim for refund constituted a rejection of all claims for refund then before the Bureau. It is also held that a claim for refund may not be changed by amendment after rejection.

Official notice of the disallowance of your claims will therefore be issued by registered mail in accordance with Section 1103 (a) of the Revenue Act of 1932.

These claims were rejected on a schedule dated December 29, 1933, and the plaintiff was duly notified thereof.

19. Plaintiff's informal claim for refund filed on February 24, 1927, was based alone on a payment of tax after the running of the statute of limitations. Its claims filed on April 18, 1929, May 20, 1932, and July 25, 1932, were based on a ground that had no relation to a payment of tax after the bar of the statute, and were filed after the running of the statute of limitations.

The court decided that the plaintiff was not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

This case presents two questions: first, whether or not a sufficient and timely claim for refund was filed; and, second, whether or not the action of the Commissioner taken sub-

sequent to July 11, 1932, and prior to July 10, 1933, was a redetermination of the tax liability.

The plaintiff insists that a certain letter written by it to Collector of Internal Revenue Bowers under date of February 24, 1927, was an informal claim for refund; that this claim was filed before the bar of the statute of limitations; that its subsequent claims filed on April 18, 1929, May 20, 1932, and July 25, 1932, after the running of the statute, were proper amendments of its informal claim and, therefore, being amendments, they were filed in time.

With this contention we cannot agree.

Plaintiff's letter of February 24, 1927, referred to an interview in the New York Times by Collector Frank K. Bowers. In that interview Collector Bowers referred to the decision of the United States Supreme Court in the case of *New York and Albany Lighterage Co.* v. *Bowers*, 273 U. S. 346, holding that the Government has no right to seize the property of taxpayers in distraint proceedings in cases where the taxpayers are protected by the statute of limitations against ordinary court proceedings for the collection of back taxes. Plaintiff in its letter stated that Collector Bowers in his interview had stated that he would make refunds to taxpayers for back taxes paid after the statute of limitations had expired. In the second paragraph of plaintiff's letter it set out the taxes paid and stated, "We wish to make claim for the refund of these amounts, if due us," and requested the Collector to file on its behalf a claim for such refund.

It seems clear to us that this claim was based alone on a possible payment of taxes after the statute of limitations had expired. It was not a general claim for refund, but one based upon a specific ground.

Plaintiff's subsequent claims for refund were based upon its right to special assessment under Sections 327 and 328 of the Revenue Act of 1918 (40 Stat. 1057, 1092, 1093). This ground had no relation whatever to the payment of taxes after the bar of the statute. They were new and independent claims for refund, and cannot be considered as valid amendments of the former informal claim filed on February 24, 1927. *United States* v. *Andrews*, 302 U. S. 517.

Since these claims of April 18, 1929, May 20, 1932, and July 25, 1932, were filed after the expiration of the statute of limitations for filing claims the Commissioner properly disallowed them, and plaintiff is, therefore, not entitled to recover.

This view makes it unnecessary for us to discuss whether or not the Commissioner's action taken as a result of plaintiff's appeal to him on July 11, 1932, for a redetermination of its tax liability under the provisions of Sections 327 and 328 of the Revenue Act of 1918, amounted to a redetermination by the Commissioner of an overassessment.

Plaintiff is not entitled to recover and the petition is dismissed. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

SOUTHERN PACIFIC COMPANY v. THE UNITED STATES

[No. 43139. Decided November 6, 1939]

On the Proofs

Land-grant deductions; transportation of officers and enlisted men; Civilian Conservation Corps.—Transportation of certain officers and enlisted men of the armed forces of the United States assigned to duty with the Civilian Conservation Corps, a purely civilian organization, is held not to be transportation of the "troops of the United States" as these words are used in applicable land-grant laws for the reason that their activities are nonmilitary in character, and the Government was not entitled to any deduction from the regular railroad rates for their transportation.

The Reporter's statement of the case:

Mr. James R. Bell for plaintiff.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for defendant.

The court made special findings of fact as follows:

1. Plaintiff is a corporation of the State of Kentucky and was and is engaged as a common carrier in the transportation by railroad of persons and property in and through various States of the United States.

2. During the period from and including May 1933 to and including October 1934, plaintiff, as the initial carrier in all instances, transported certain officers and enlisted men of the United States Army, United States Reserve Corps, United States Marine Corps, and United States Navy, such officers and enlisted men having been transported between points on the lines of railroad of the plaintiff and from points on the lines of railroad of the plaintiff to points on the lines of other common carriers by railroad. Such transportation was furnished upon transportation requests issued to plaintiff by the United States War Department, Quartermaster Corps. They are listed in Exhibit A, which is attached to the petition and made a part hereof by reference.

3. At the times of the transportation herein referred to, said officers and enlisted men had been and were officially and lawfully assigned to duty with the Civilian Conservation Corps. Such travel was in connection with their assignment to such duty and their expenses and cost of transportation were lawfully chargeable to and paid from the Emergency Conservation Fund, being a fund authorized by Act of Congress and allocated or established by Executive Order of the President for the purpose of carrying out the provisions of the Act of Congress for the relief of unemployment through the performance of useful public work, and for other purposes.

4. Although administrated by officers of the United States Army and Reserve Corps, the Civilian Conservation Corps constitutes and, during the period of the transportation here involved, constituted a purely civil organization, being in no sense a military organization, its entire personnel being made up of civilians. All work, service, and activities of enrollees of the Civilian Conservation Corps and of those assigned to duty therewith are and were nonmilitary in character. No military training is or was undertaken

and the sole purpose of the assignment of the officers and men, referred to herein, to duty with the Civilian Conservation Corps was to assist the Government in executing the plan adopted by Congress for unemployment relief.

5. For the transportation performed, as hereinbefore referred to, the plaintiff in due course rendered its bills against the United States, based on the lawfully published, effective and applicable tariff fares, in instances where the aforesaid officers and enlisted men were not accompanying members of the Civilian Conservation Corps and upon the basis of certain written agreements in effect between the railroads and the Quartermaster General of the War Department covering charges applicable for the transportation of the officers and men when traveling as escorts or guards accompanying members of the Civilian Conservation Corps, except that where the lawfully published and effective tariff fare for such transportation was lower than the charge provided in the agreements, plaintiff charged this tariff fare and billed the Government on such basis.

The Government refused to pay plaintiff's bills for the full amount rendered and in settling plaintiff's accounts for transportation so furnished, the Government's General Accounting Office made certain land-grant mileage percentage deductions from the amounts computed by plaintiff at the regular commercial fares and at the contract charges, as aforesaid, on the ground that the persons transported were troops of the United States within the meaning of land-grant acts providing for the transportation of the property or troops of the United States.

Plaintiff accepted such payments under protest that the travel of such officers and men was on nonmilitary duty in connection with Civilian Conservation Corps and that plaintiff was entitled to the full amount of the bills rendered.

6. Plaintiff is the owner of the claim here sued on, having made no assignment thereof. If the officers and enlisted men assigned to duty with the Civilian Conservation Corps did not constitute troops of the United States within the meaning of the land-grant acts, there is due plaintiff the sum of $1,911.45, which amount plaintiff is entitled to recover of and from the United States.

If the aforesaid officers and enlisted men constituted troops of the United States within the meaning of the land-grant acts, defendant is entitled to retain the amount of the deductions.

The court decided that the plaintiff was entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

Plaintiff brings this suit to recover a balance alleged to be due for the transportation of certain officers and enlisted men who were assigned by the Government to duty with the Civilian Conservation Corps. The parties agree that this travel was in connection with their assignment of such duty and that their expenses and cost of transportation were lawfully chargeable to and paid from the Emergency Conservation Fund, being a fund authorized by act of Congress and allocated or established by executive order of the President for the purpose of carrying out the provisions of the act of Congress for the relief of unemployment, and for other purposes. It is agreed by the parties that the Civilian Conservation Corps constituted a purely civil organization and that the activities of those assigned to duty therewith were nonmilitary in their character. The plaintiff presented bills to the Government for the transportation of these officers and enlisted men at the regular commercial rates, but the General Accounting Office made certain deductions from the sum so charged on the ground that the persons transported were troops of the United States within the meaning of the land-grant acts and consequently the Government was entitled to a lower fare. The parties further agree that if the officers and enlisted men assigned to duty with the Civilian Conservation Corps did not constitute troops of the United States within the meaning of the land-grant acts, there is due the plaintiff the sum of $1,911.45 which plaintiff is entitled to recover herein.

The case is controlled by the decision of the Supreme Court in *Southern Pacific Co.* v. *United States*, 285 U. S. 240, wherein it was held that engineer officers of the United States when engaged in work in connection with rivers and harbors are not part of the "troops of the United States" as

these words are used in applicable land-grant laws for the reason that their activities are nonmilitary in character. In the instant case the parties agree that the officers and men involved in the suit were engaged when transported in duties which were nonmilitary in character. The Government, therefore, was not entitled to any deduction from the regular rates in making payment for their transportation.

When this suit was begun the petition included a claim for $377.45 as the balance due from defendant for the transportation of officers and enlisted men assigned to duty with the Army Air Corps. This claim has been withdrawn.

Judgment will be rendered for plaintiff in the sum of $1,911.45. It is so ordered.

WILLIAMS, *Judge*; LITTLETON, *Judge*; and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

BRITISH AMERICAN TOBACCO COMPANY, LTD., v. THE UNITED STATES

[No. 43217. Decided November 6, 1939. Plaintiff's motion for new trial overruled January 8, 1940.]

On Plea to Jurisdiction

Jurisdiction; suits instituted upon same set of facts.—Where the only distinction between two suits, one instituted in the United States District Court against an agent of the United States and the other instituted in the Court of Claims against the United States, is that the action in the District Court was made to sound in tort and the action in the Court of Claims was alleged on contract, the facts existing and operating in both cases being the same, it is held that under Section 154 of the Judicial Code and the decision in *Corona Coal Co.* v. *The United States*, 263 U. S. 537, the Court of Claims is without jurisdiction, the case in the District Court having been prosecuted to a conclusion.

Same.—A recital of the operative facts relied upon by a claimant does not state two separate and distinct causes of action merely because such facts may set up a liability both in tort and contract.

Same.—There is no provision that a suit in the Court of Claims against the United States may be prosecuted if the suit in another court against an agent of the United States is dismissed by final adjudication upon the merits.

The Reporter's statement of the case:

Mr. Joseph M. Hartfield, Mr. Roy H. Callahan, and *White & Case* for the plaintiff.

Mr. H. LeRoy Jones, with whom was *Mr. Assistant Attorney General James W. Morris,* for the defendant. *Mr. Enoch E. Ellison, Mr. Clarence V. Opper,* and *Mr. Bernard Bernstein* were on the brief.

The facts sufficiently appear from the opinion, *per curiam,* as follows:

Plaintiff filed its petition in this court to recover $4,331,509.75 damage or compensation on the ground that this sum represented the amount due in excess of $6,249,235.85 paid to plaintiff in currency by the Federal Reserve Bank of New York, upon delivery to that bank by plaintiff pursuant to Executive Orders and Regulations made and issued by the President and the Secretary of the Treasury, pursuant to certain acts of Congress, for 302,307.017 fine ounces of gold bullion.

At the time the petition was filed in this court, the plaintiff had filed on the same day and had pending in the District Court of the United States for the Southern District of New York a suit based upon the same claim set forth in the petition in this court for the recovery of the same amount for the same gold bullion surrendered and delivered to the Federal Reserve Bank at New York, as aforesaid, for which it received the sum mentioned in legal-tender currency. The court finds as a fact that upon the issuance of the Executive Orders and Regulations with reference to the surrender and delivery of gold and gold bullion, which orders and regulations need not be here set forth, and at the time plaintiff's alleged claim arose, and at the time the petition was filed in this court, the Federal Reserve Bank of New York was at all times, and at all times subsequent thereto, acting and professing to act in respect of the delivery by plaintiff, receipt, and payment for the said gold bullion, mediately and immediately, under the authority of the United States and as the authorized agent of the United States in such matters.

Per Curiam

From this it seems clear that under section 154 of the Judicial Code (Tit. 28, U. S. Code, Sec. 260), and the decision in *Corona Coal Co.* v. *United States*, 263 U. S. 537, this court is without jurisdiction for the reason that plaintiff was prohibited from filing or prosecuting in this court any claim in respect of which it had instituted a suit against the Federal Reserve Bank acting, in such matters, under the authority of the United States.

The only distinction between the two suits instituted in the District Court and in this court is that the action in the District Court was made to sound in tort and the action in this court was alleged on contract. The facts existing and operating in both cases are the same. A recital of the operative facts relied upon by a claimant does not state two separate and distinct causes of action merely because such facts may set up a liability both in tort and contract. The terms "conversion" used in the suit in the District Court and "taking of property without just compensation" in the suit in this court were obviously used by plaintiff for the purpose of attempting to adapt the single claim to the jurisdiction of the different courts in which the claim was being urged, but the use of these terms does not obscure the unity or sameness of the claim. We think it is clear that the word "claim," as used in section 154, supra, has no reference to the legal theory upon which a claimant seeks to enforce his demand if it appears, as it does here, that the defendant in a suit in another court was, in respect of the subject matter or property in respect of which the claim was made, acting mediately or immediately upon the authority of the United States. The terms of section 154 refer to a claim "for or in respect of which" another suit is pending. The legislative history of section 154 of the Judicial Code, originally enacted as section 8 of the act of June 25, 1868, 15 Stat. 77, supports these conclusions. See Congressional Globe, 40th Congress, 2d sess., 1868, p. 2769.

Plaintiff never dismissed the suit which it had instituted in the District Court for the Southern District of New York but diligently prosecuted the same through the District

Per Curiam

Court, the Circuit Court of Appeals, and to the Supreme Court. The District Court and the Circuit Court of Appeals, 104 Fed. (2d) 652, held under the authority of *Nortz v. United States*, 294 U. S. 317, that plaintiff was not entitled to recover, and on October 23, 1939, the Supreme Court denied plaintiff's petition for certiorari. In these circumstances there is no merit in the contention now made by plaintiff that this court has jurisdiction and that plaintiff is now entitled to prosecute the claim presented by the petition in this court for the reason that the suit in the District Court has been dismissed and is not now pending. The suit against the Federal Reserve Bank was prosecuted to finality. Plaintiff thereby elected to stand upon its claim made in a suit against an agent of the United States. The provisions of section 154, *supra*, against *prosecution* of a suit in this court still apply. There is no provision that a suit in this court against the United States may be prosecuted if the suit in another court against an agent of the United States is dismissed by final adjudication upon the merits. The whole purpose of the act was to prevent this being done. Under the clear provisions of the original section 8 (act of June 25, 1868, *supra*), an election once having been made, a dismissal on the merits of a suit in another court does not give this court jurisdiction. This is clear from the provisions of section 8, which state that "No person shall file or prosecute any claim or suit in the Court of Claims, or an appeal therefrom, for or in respect to which he * * * shall have commenced and has pending any suit or process in another court * * *, unless such suit or process, if now pending in such other court, shall be withdrawn or dismissed within thirty days after the passage of this act."

Defendant's plea to the jurisdiction is sustained, and the petition is dismissed. It is so ordered.

ALMA L. WOOD, ADMINISTRATRIX OF THE ESTATE OF WALTER T. WOOD, DECEASED, v. THE UNITED STATES

[No. 43276. Decided November 6, 1939]

On the Proofs

Estate tax; fair market value.—Where in making a return for estate taxation the value placed upon stock held by decedent in a closed or family corporation was based upon the book value at the time of decedent's death and upon an isolated sale of stock more than a year before decedent's death, and where it is shown that the market value of the stock in question was adversely affected by unfavorable trade conditions at the time of decedent's death, it is held that the return did not reflect the "fair market value" of the stock.

Same.—Comparable sales of stock at about the basic date involved afford evidence of value and are to be considered in arriving at the fair market value but such sales and the price paid are not necessarily decisive of fair market price or value.

Same.—Sales made under peculiar and unusual circumstances, such as sales of small lots, forced sales and sales in a restricted market may not signify a fair market price or value.

The Reporter's statement of the case:

Mr. Frank J. Albus for the plaintiff. *Messrs. Virgil Y. Moore, George M. Naus,* and *Andrew T. Smith,* were on the briefs.

Mr. Daniel F. Hickey, with whom was *Mr. Assistant Attorney General James W. Morris,* for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the briefs.

The court made special findings of fact as follows:

1. Decedent, Walter T. Wood, was a citizen of the United States and a resident of California. At the time of his death, September 25, 1929, he was vice president of the E. K. Wood Lumber Co. (hereinafter sometimes referred to as the "company"), of San Francisco, California, and had been active in its management.

Reporter's Statement of the Case

2. The original plaintiff herein, Frederick J. Wood, executor of the estate of Walter T. Wood, was a citizen of the United States and a resident of Bellingham, Washington. He was the brother of Walter T. Wood and was named executor in the latter's last will and testament, duly qualifying as such and acting in that capacity until his death June 22, 1937. For many years prior to his death, and during the pendency of these proceedings, he was president of the E. K. Wood Lumber Co., having succeeded his father, E. K. Wood, in 1917. His general reputation for integrity, conservatism, and ability was of the highest character.

3. After the death of Frederick J. Wood, the original plaintiff herein, Alma L. Wood, widow of the decedent, Walter T. Wood, was appointed administratrix with the will annexed of the decedent's estate. She duly qualified as administratrix and is now acting in that capacity. On appropriate motion Alma L. Wood was substituted by this court on November 24, 1937, for Frederick J. Wood, deceased, as plaintiff in this proceeding.

4. June 14, 1930, Frederick J. Wood as executor of the estate of Walter T. Wood filed a Federal estate tax return for the estate showing a net estate of $2,812,954.12 and a tax due of $43,584.99, which tax was paid on the same day. August 10, 1931, an additional estate tax of $92.62, with interest of 99 cents, was paid, making a total tax and interest paid of $43,678.60.

5. As Item 12 of Schedule B there was reported in the estate tax return as a part of the decedent's gross estate 2,323,278 shares of common stock of the E. K. Wood Lumber Co. at a valuation of $1.00 a share, that is, a total valuation of $2,323,278. That valuation was not changed by the Commissioner of Internal Revenue.

6. May 28, 1933, Frederick J. Wood as executor of the estate of Walter T. Wood filed a claim for refund of $23,-253.94 and assigned the following basis therefor:

> The assets of the estate of Walter T. Wood included 2,323,278 shares of the common stock of the E. K. Wood Lumber Co., San Francisco, California, which were entered in the Federal estate tax return of said estate at a value of $1.00 per share or $2,323,278.00. This

value was predicated upon the book value of the said stock at the date of decedent's death together with an isolated sale which was consummated more than a year before such date and appraisals of the said stock for estate tax purposes in 1928 and prior years. The company's earnings record during the previous five years, its business prospects at the date of decedent's death, conditions in the timber industry as a whole, the absence of an open market for the stock, the lack of marketability of many of the company's properties and other important factors were not considered in arriving at such appraised value.

Based on a consideration of the above factors, the value has been recomputed at 50 cents a share which results in a corrected estate tax liability, after giving effect to the eighty percent credit for State inheritance tax, of $20,423.67 and an allowable refund of $23,253.94.

Both the original return and the claim for refund were signed and duly executed by Frederick J. Wood as executor of the estate of Walter T. Wood.

March 7, 1934, the Commissioner rejected the claim for refund, giving the following reason for his action:

> All factors now of record in the case bearing on the value of the stock of the E. K. Wood Lumber Company have been carefully considered and it is concluded that the return value, which was accepted in the audit, is the fair market value of this stock as of the date of the death of this decedent. Therefore, no adjustment as to the value of this stock is warranted.

7. The E. K. Wood Lumber Co. was organized prior to 1905 by E. K. Wood, father of the decedent, Walter T. Wood, and of the latter's original executor, Frederick J. Wood.

The company was at September 25, 1929, and has always been, a closed corporation, or what is commonly understood as a family corporation. December 31, 1929, the Wood family owned 79 percent of its stock; the Thayer family (Thayer was a brother-in-law of E. K. Wood), 13 percent; the Kellog family (likewise related), six percent; and employees of the company the remaining two per cent. A similar situation as to stock holdings has existed throughout the life of the company.

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8. In 1905 the company had an authorized capital stock of 2,000,000 shares of a par value of $1.00 each, of which 1,445,000 shares were outstanding and by 1914 the remaining unissued stock had been issued. June 22, 1921, the capitalization was increased by a stock dividend of 150 percent to 5,000,000 shares of a par value of $1.00 each, and on June 21, 1924, the capitalization was increased by a stock dividend of 50 percent to 7,500,000 shares at a par value of $1.00 a share. January 25, 1927, the capitalization was further increased by a stock dividend of 10 percent to 8,250,000 shares of a par value of $1.00 each. A substantial part of the increased capitalization was offset by appreciation of the book value of the company's assets.

9. Throughout its life the company has been engaged in the business of buying, selling, and manufacturing lumber on the Pacific coast, the purchase and sale of timber lands, and other activities incidental to its general lumber business. While the greater part of its lumber was sold on the Pacific coast, some of its products were exported and some shipped to other parts of the United States. One of its principal products was of Douglas fir.

In 1929 the company owned timber lands in the States of Oregon and Washington, where it had standing timber of approximately one billion feet. At that time it had sawmills at Anacortes and Hoquiam, Washington, which were in operation. The Hoquiam mill was very old, having been in operation since prior to 1908. The Anacortes mill was commenced in 1923 and completed in 1925. The Hoquiam mill has been shut down since May 1930, and the Anacortes mill was likewise shut down about the same time, but it has operated for some periods since that time. In 1929 logs for both mills were bought by the company in the open market without drawing upon its standing timber, as it was found lumber could be produced more economically in that manner. However, only about one-third of the lumber handled by the company was produced by its mills, the remaining two-thirds being purchased in the open market. While it maintained yards and offices at other places, its principal

selling outlets in 1929 and other years were yards in and around Los Angeles and Oakland, California, the Los Angeles yard being the main selling outlet in southern California and Oakland in northern California. Sales of lumber by the company at its yards in Oakland and Los Angeles from 1922 to 1935, inclusive, were as shown below:

	Oakland		
	Feet	Sales	
		Amount	Per M
1922	40, 320, 702	$1, 645, 720. 80	$40. 82
1923	44, 153, 101	2, 039, 965. 95	46. 20
1924	38, 253, 393	1, 578, 232. 14	41. 25
1925	44, 050, 620	1, 537, 749. 04	34. 91
1926	37, 068, 765	1, 209, 085. 73	32. 61
1927	27, 547, 056	941, 720. 53	34. 18
1928	29, 236, 568	865, 083. 56	29. 59
1929	33, 827, 690	1, 036, 679. 90	30. 65
1930	21, 922, 205	658, 522. 79	30. 04
1931 (11 months)	15, 037, 391	408, 257. 28	27. 15
1932	7, 587, 603	219, 315. 64	28. 90
1933	6, 373, 898	203, 150. 80	31. 87
1934	5, 094, 067	182, 589. 14	35. 84
1935	10, 290, 216	324, 305. 85	31. 52

	Los Angeles		
	Feet	Sales	
		Amount	Per M
1922	130, 933, 736	$5, 486, 988. 16	$41. 90
1923	163, 002, 984	7, 551, 892. 05	46. 33
1924	140, 051, 559	4, 965, 855. 36	35. 46
1925	132, 914, 149	4, 397, 279. 53	33. 08
1926	122, 437, 130	4, 002, 737. 59	32. 69
1927	133, 371, 853	4, 137, 499. 29	31. 02
1928	138, 627, 396	4, 434, 802. 08	31. 99
1929	121, 854, 559	4, 049, 999. 89	33. 24
1930	104, 514, 848	3, 034, 297. 52	29. 03
1931 (11 months)	62, 671, 067	1, 710, 211. 55	27. 29
1932	56, 366, 801	1, 276, 692. 88	22. 65
1933	65, 145, 359	1, 674, 002. 64	25. 70
1934	61, 728, 458	2, 023, 817. 00	32. 79
1935	94, 560, 474	3, 025, 031. 12	31. 99

The average prices set out above are reasonably representative of the trend in lumber prices during the years mentioned.

10. During the years shortly after the World War there were a substantial number of purchases and sales of lumber concerns and large bodies of timber on the Pacific coast, and the lumber industry enjoyed a period of prosperity from

1921 to 1924. Building began to increase in southern California about 1921 and by 1923 had reached "boom" proportions. Building activity and demand for lumber began to decrease in 1924 and continued its downward trend, with certain minor exceptions, at least until about 1935. During the period of the decline there was an excess production of lumber and much "distress" lumber found its way to the market, thereby depressing the price of lumber. During that period and by 1929 lumber concerns were having financial difficulties. In 1929 the lumber industry generally on the Pacific coast was in an unfavorable position and its future prospects were not good.

11. The balance sheet of E. K. Wood Lumber Co., at December 31, 1929,[1] reflected the following condition:

E. K. Wood Lumber Company Balance Sheet, December 31, 1929

ASSETS

Current:			
Cash		$111, 105. 65	
Accounts and notes receivable		1, 428, 410. 33	
Thermal Branch—December transactions		1, 232. 40	
Due from vessels		13, 694. 66	
Inventories [2]		1, 824, 815. 48	
Total current			3, 379, 258. 52
Notes receivable deferred			107, 959. 99
Stocks and bonds			124, 056. 15
Other real estate			253, 986. 94
Timber and timber land			2, 387, 721. 94
Mills:			
Mill sites		$383, 409. 36	
Mills and equipment	$1, 882, 975. 61		
Bellingham salvage	27, 200. 00		
	1, 910, 175. 61		
Less reserve for depreciation	807, 002. 67		
		1, 103, 172. 94	
Total mills			$1, 486, 582. 30

[1] No balance sheet was available at September 25, 1929, the date of decedent's death, but the condition of the company at that date was not materially different from that shown on December 31, 1929.

[2] Inventories were priced at market.

Yards:			
Yard sites		$480,665.04	
Appreciation—Oakland and Los Angeles—1927		861,404.90	
		1,342,069.94	
Mills and equipment	$1,838,470.31		
Less reserve for depreciation	1,111,666.54		
	726,803.77		
Office equipment and automobiles—depreciated	2,307.16		
		729,110.93	
Total yards			2,071,180.87
Vessel equipment:			
Vessels		$830,696.74	
Less reserve for depreciation		506,358.24	
Total vessel equipment			324,338.50
Office equipment and automobiles—depreciated			2,234.64
Prepaid expenses			48,028.52
			10,185,348.37

LIABILITIES, CAPITAL, AND SURPLUS

Current:		
Bank overdrafts	$10,624.63	
Drafts in transit	42,266.90	
Notes payable—bank	296,000.00	
Accounts payable and pay rolls	174,571.24	
December transactions — Indio Branch	7,023.04	
Due to vessels and owners	12,316.51	
Accrued taxes	77,298.15	
Anticipated cash discounts	1,942.48	
Deposit on sales	275.00	
Total current		622,317.95
Mortgage payable		3,500.00

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Capital and surplus:		
Capital stock—8,250,000 shares	$8,250,000.00	
Surplus	1,309,530.42	
Total capital and surplus		9,559,530.42
		10,185,348.37

12. The net earnings of the E. K. Wood Lumber Co. after payment of Federal income tax for the years hereinafter appearing are, respectively, as follows:

Year	Net Profit or Loss (Realized Appreciation included)
1905	$401,472.90
1906	792,162.81
1907	134,183.79
1908	215,897.93
1909	334,022.24
1910	134,094.50
1911	130,740.24
1912	382,939.71
1913	962,972.70
1914	75,115.74
1915	(6,701.10)
1916	463,137.00
1917	615,491.19
1918	476,198.41
1919	573,973.91
1920	783,879.60
1921	407,144.56
1922	925,160.68
1923	1,606,880.75
1924	155,712.16
1925	91,199.05
1926	14,043.16
1927	4,737.43
1928	208,742.25
1929	13,645.81
1930	(446,479.64)
1931 (11 months)	(367,104.75)
1932	(350,035.32)
1933	(30,105.29)
1934	(414,246.52)
1935	4,491.58
Total	8,293,367.48

NOTE.—Figures in parentheses indicate loss.

13. The division of net earnings between the company's yards and all its other divisions is as follows for the respective years mentioned below:

Year	Net profit (or loss), years 1922–29		
	Total for company	Yards	Other divisions
1922	$925, 160. 68	$787, 343. 73	$137, 816. 95
1923	1, 606, 880. 75	1, 094, 017. 68	512, 863. 07
1924	155, 712. 16	179, 611. 16	(23, 899. 00)
1925	91, 199. 05	152, 937. 14	(61, 738. 09)
1926	14, 043. 16	159, 652. 71	(145, 609. 55)
1927	4, 737. 43	217, 409. 62	(212, 672. 19)
1928	208, 742. 25	279, 116. 44	(70, 374. 19)
1929	13, 645. 81	123, 691. 84	(110, 046. 03)
Total	3, 020, 121. 29	2, 993, 780. 32	26, 340. 97

14. The E. K. Wood Lumber Co. paid cash dividends for the years set out below as follows:

Year	*Cash Dividends Paid*
1905	None
1906	$200, 806. 00
1907	210, 651. 96
1908	77, 384. 00
1909	116, 076. 00
1910	116, 076. 00
1911	67, 711. 00
1912	116, 076. 00
1913	193, 460. 00
1914	174, 673. 00
1915	280, 000. 00
1916	180, 000. 00
1917	180, 000. 00
1918	380, 000. 00
1919	380, 000. 00
1920	340, 787. 96
1921	275, 000. 00
1922	300, 000. 00
1923	300, 000. 00
1924	450, 000. 00
1925	187, 500. 00
1926	112, 500. 00
1927	123, 750. 00
1928	123, 750. 00
1929	123, 750. 00
1930	96, 968. 75
1931 (11 months)	36, 066. 27
1932	None

Reporter's Statement of the Case

Year	Cash Dividends Paid
1933	None
1934	None
1935	None
Total	$5,142,986.94

15. In 1929 standing timber in general was not readily salable and at that time many concerns were delinquent in their payment of taxes on such properties. As heretofore shown the E. K. Wood Lumber Co. had not for some years cut any appreciable amount of its standing timber, the lumber produced at its mills being produced from logs bought in the open market. The value attaching to the company's timber holdings in 1929 was largely as a reserve supply of timber against which it could draw when conditions warranted the use or sale of such holdings. The company, however, made sales from time to time in each of the years from 1923 to 1929 of timber and timberlands which showed a total net amount received of approximately $474,000 in excess of the March 1, 1913 value (with adjustment for depletion and subsequent purchases at cost) as used by the company in its "Timber Industries Report" to the Internal Revenue Bureau, such amount being computed as follows:

Year	Quantity	Mar. 1, 1913 value	Price received	Excess of price received over Mar. 1, 1913 value
1923	170,027 M	$340,545.31	$579,440.36	$238,895.05
1924	25,589 M 480 A	54,529.15	107,348.59	52,819.44
1925	27,614 M 360 A	53,561.05	86,766.63	33,205.58
1926	65,703 M 1,208.2 A	138,254.85	215,557.57	77,302.72
1927	32,267 M 440 A	69,262.75	136,666.92	67,404.17
1928	35,190 M	61,685.90	125,582.29	63,896.39
1929	23,952 M	40,714.70	90,555.71	49,841.01
	380,342 M 2,488.2 A	758,553.71	1,341,918.07	583,364.36
DEDUCTIONS—ADJUSTMENTS TO 1933 TRANSACTIONS				
1925	10,902 M	$17,988.30	$30,379.10	$17,065.73
1926	42,490 M	84,980.00	177,063.50	92,083.50
	53,392 M	102,968.30	207,442.60	109,149.23
Net	326,950 M 2,488.2 A	655,585.41	1,134,475.47	474,215.13

The company was not in liquidation, nor did it contemplate liquidation in 1929. It continued in business as a going concern at least until 1937.

16. August 13, 1928, Guy C. Wallace, a nephew of Walter T. Wood, decedent, sold 12,623 shares at $1.00 a share. At that time Wallace advised his uncle, Walter T. Wood, of his desire to sell the stock because of financial difficulties. When the offer to sell was made the general manager of the company offered to take a sufficient number of the shares offered to make his holdings of stock in the company 50,000 shares, and accordingly bought 3,470 shares; the remainder, 9,153 shares, were purchased by Walter T. Wood, the decedent. Both purchases were made at $1.00 a share.

17. The stock of the E. K. Wood Lumber Co. was not listed on any exchange, was not readily salable in the open market, and was not bought or sold except in isolated instances by members of the family or employes of the company. There were no restrictions on its sale by or to members of the family, employes, or outsiders.

18. The fair market value of 2,323,278 shares of the common stock of the E. K. Wood Lumber Co. which was included in the gross estate of Walter T. Wood was not in excess of 50 cents a share on September 25, 1929, the date of decedent's death.

The court decided that the plaintiff was entitled to recover.

WILLIAMS, *Judge*, delivered the opinion of the court:

The sole question for decision in this case is one of fact—the fair market value of 2,323,278 shares of common stock of the E. K. Wood Lumber Co., owned by decedent Walter T. Wood on September 25, 1929, the date of his death.

The executor of the estate placed a valuation of $1.00 a share on this stock in the Federal estate-tax return made by him. That valuation was not changed by the Commissioner of Internal Revenue and the stock was included in the decedent's gross estate at a valuation of $2,323,278. Subse-

quently the executor filed a claim for refund of $23,253.94, assigning as the basis therefor the following:

> The assets of the estate of Walter T. Wood included 2,323,278 shares of the common stock of the E. K. Wood Lumber Co., San Francisco, California, which were entered in the Federal estate-tax return of said estate at a value of $1.00 per share or $2,323,278.00. This value was predicated upon the book value of the said stock at the date of decedent's death together with an isolated sale which was consummated more than a year before such date and appraisals of the said stock for estate-tax purposes in 1928 and prior years. The company's earnings record during the previous five years, its business prospects at the date of decedent's death, conditions in the timber industry as a whole, the absence of an open market for the stock, the lack of marketability of many of the company's properties and other important factors were not considered in arriving at such appraised value.
>
> Based on a consideration of the above factors, the value has been recomputed at 50 cents a share, which results in a corrected estate-tax liability, after giving effect to the eighty percent credit for State inheritance tax of $20,423.67 and an allowable refund of $23,253.94.

The claim for refund was disallowed by the Commissioner and thereafter this suit was timely instituted by the executor.

The legal definition of "fair market value" is well established. In *Phillips* v. *United States*, 12 Fed. (2d) 598, the rule is stated:

> The test is the fair market value. This may be defined to be the value of the property in money as between one who wishes to purchase and one who wishes to sell; the price at which a seller willing to sell at a fair price, and a buyer willing to buy at a fair price, both having reasonable knowledge of the facts.

The rule is also succinctly stated by the Supreme Court in *Adams Express Co.* v. *Ohio*, 166 U. S. 185:

> Now, it is a cardinal rule which should never be forgotten that whatever property is worth for the purposes of income and sale it is also worth for purposes of taxation.

> * * * The value which property bears in the market, the amount for which its stock can be bought and sold, is the real value. Businessmen do not pay cash for property in moonshine or dreamland. They buy and pay for that which is of value in its power to produce income, or for purposes of sale.

The E. K. Wood Lumber Company was what is known as a closed or family corporation, the E. K. Wood and related families owning 98 percent of the stock. The stock was not listed on any stock exchange. It is a well recognized fact that stock in such a corporation is hard to sell and is not readily marketable, there being no market except that afforded by the few other stockholders. *Cartier* v. *Commissioner*, 37 Fed. (2d) 894; *Dohrmann* v. *Commissioner*, 19 B. T. A. 507.

Aside from the inherent difficulty in finding a market for the stock of a family corporation the market value of the stock in question was adversely affected by the unfavorable conditions of the lumber industry generally at the time of decedent's death in 1929. Prior to the year 1924 there had been a great and continually increasing demand for lumber in the northwest and well-managed lumber concerns earned large profits and were quite prosperous. Beginning, however, in the early part of 1924 the demand for lumber began to decline and continued to do so during the remainder of that year and through the years 1925, 1926, 1927, 1928, and 1929. By 1929 the earnings of lumber concerns had reached substantially the point of no earnings at all and the stocks and property of such concerns practically ceased to be marketable at any price. During this period there was an excess production of lumber and much of what is known in the lumber industry as "distress" lumber found its way to the market. Lumber companies generally throughout the Pacific northwest were in distress financially. Many of them began to go into receivership as early as 1925; this process continued throughout 1926, 1927, 1928, and 1929, and for some years thereafter.

The unprosperous condition of the E. K. Wood Lumber Company in 1929 is shown when comparison is made of the net earnings of the company for the five-year period 1925 to

1929, inclusive, $332,367.70, with the preceding five-year period 1920 to 1924, inclusive, $3,878,777.75. The earnings of the company dropped from $1,606,880.75 for the year 1923 to $13,645.81 for the year 1929. Instead of the large and continually increasing earnings of the company that prevailed prior to the year 1924 such earnings had decreased steadily until by September 1929 they had substantially reached the point of no earnings at all. These earnings vanished entirely during the following five-year period during which large net losses were sustained annually.

It is a well-recognized rule that comparable sales of stock at about the basic date involved afford evidence of value and are to be considered in arriving at the fair market value, but such sales and the price paid are not necessarily decisive of fair market price or value. *Heiner* v. *Crosby*, 24 Fed. (2d) 191; *Will M. Ott* v. *Commissioner*, 15 B. T. A. 867; *Walter* v. *Duffy*, 287 Fed. 41. Thus sales made under peculiar and unusual circumstances, such as sales of small lots, forced sales, and sales in a restricted market may not signify a fair market price or value. As we have seen the stock of the E. K. Wood Lumber Company was not listed on any stock exchange and was not salable in the open market. The defendant in its contention that the stock was worth $1.00 a share, aside from the testimony of a single witness that that was its value, relies on a single transaction occurring on August 13, 1928, wherein the decedent and the general manager of the company bought 12,623 shares from the decedent's nephew at that price, the decedent acquiring in the transaction 9,153 shares, and the general manager of the company 3,470 shares.

This transaction was an isolated one, the only one shown involving the purchase and sale of the stock of the E. K. Wood Lumber Company subsequent to the year 1922 when the company was earning large dividends and enjoying great prosperity. The transaction involved a relatively small block of shares, representing only about 15/100 of one percent of the stock of the company. The sale of this relatively insignificant block of stock at a par value of $1.00 a share is not sufficient to establish that price as the fair mar-

ket value of the stock, *MacRae* v. *Commissioner*, 9 B. T. A. 428; *Yochim Brothers Co., Ltd.* v. *Commissioner*, 6 B. T. A. 984, and is entitled to very little weight in a determination of such value.

Plaintiff has introduced the opinion testimony of four witnesses in support of her contentions in respect to the fair market value of the stock of the E. K. Wood Lumber Company on the basic date involved, September 25, 1929. Two of these witnesses were familiar with the property of the company. One had only slight familiarity with the property but was conceded to be an expert in ascertaining the fair market value of corporate stocks. The other was president of a competitive lumber company and had formerly been connected with a financial institution in the Pacific northwest which specialized in financing lumber companies. He was a recognized expert in arriving at the fair market value of Pacific coast lumber stocks generally. These witnesses testified that the fair market value of the stock in question was less than 50 cents a share.

The defendant introduced the opinion testimony of but one witness, who, while not familiar with the property of the company, was unquestionably competent to give expert testimony as to the fair market value of the stock in question. This witness placed the fair market value of the stock at $1.00 a share.

The commissioner of the Court to whom the case was referred found that the fair market value of the stock of the E. K. Wood Lumber Company was not in excess of fifty cents a share on the date of the decedent's death September 25, 1929. We think this valuation is abundantly supported by the evidence and have accordingly sustained the commissioner's finding in that regard. It follows, therefore, that plaintiff is entitled to recover and is hereby awarded a judgment against the United States in the sum of $23,253.94, with interest thereon according to law. It is so ordered.

Whitaker, *Judge;* Littleton, *Judge;* Green, *Judge;* and Whaley, *Chief Justice*, concur.

Reporter's Statement of the Case

VIRGINIA ENGINEERING COMPANY, INC. v. THE UNITED STATES

[No. 43366. Decided November 6, 1939]

On the Proofs

Government contract; extra expense due to sympathetic strike.—Where contractor corporation engaged in work on Government building was proceeding satisfactorily with its work schedule, with nonunion labor, and where by reason of a sympathetic strike by union employes of other contractors engaged on the same project, all work thereon was suspended, and after conferences with Government representatives, contractor corporation met the demands of the unions, thereby incurring additional expense, it is held that the contractor is entitled to recover.

Same; duress.—Where Government representative called a general conference of all contractors engaged on the project and union representatives, and insisted that the strike be settled, threatening to terminate the contract if an agreement was not reached, it is held that this action constituted duress to force the contractor to meet the demands of the unions.

Just compensation.—Where the Jurisdictional Act permits the plaintiff to recover "just compensation," it is held, in accord with numerous decisions cited, that "just compensation" includes not only the value of the thing taken but, in addition thereto, interest from the date of taking to the date of payment, not as interest but as a measure of compensation.

Same; judicial interpretation.—Where judicial interpretation has been placed on the use of certain words over a lapse of time, Congress in the use of those words in subsequent statutes intended them in the light and meaning as placed upon them by the courts.

The Reporter's statement of the case:

Mr. John W. Gaskins for the plaintiff. *King & King* were on the brief.

Mr. Percy M. Cox, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. Henry Fischer* was on the briefs.

The court made special findings of fact as follows:

1. On May 1, 1936, there was approved the following Act of Congress (49 Stat. 2257):

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Court of Claims of the United States be, and it is hereby, given jurisdiction to hear and determine the claim of the Virginia Engineering Company (Incorporated), and to award just compensation for extra costs, if any, incurred in complying with requests, if any shall be found to have been made and complied with, of the Director of the Veterans' Administration incident to the work performed under contract of June 24, 1924, for equipping the Veterans' Administration Hospital at Aspinwall, Pennsylvania, and to enter decree or judgment against the United States for such just compensation, if any, notwithstanding the bars or defense of lapse of time, laches, or any statute of limitation. Suit may be instituted by the claimant at any time within four months from the approval of this Act. Proceedings in any suit brought in the Court of Claims under this Act, appeals therefrom, and payment of any judgment therein shall be had as in the case of claims over which such court has jurisdiction by virtue of the Judicial Code: *Provided*, That no part of the amount appropriated in this Act in excess of 10 per centum thereof shall be paid or delivered to or received by any agent or agents, attorney or attorneys, on account of services rendered in connection with said claim. It shall be unlawful for any agent or agents, attorney or attorneys, to exact, collect, withhold, or receive any sum of the amount appropriated in this Act in excess of 10 per centum thereof on account of services rendered in connection with said claim, any contract to the contrary notwithstanding. Any person violating the provisions of this Act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not exceeding $1,000.

2. As authorized by the act, plaintiff, a corporation of the State of Virginia, filed its petition herein July 3, 1936.

3. On June 24, 1924, plaintiff, by its president, L. U. Noland, entered into a contract with the defendant, represented by its contracting officer, George E. Ijams, Acting Director, U. S. Veterans' Bureau, whereby plaintiff, for the

sum of $191,806.00, agreed to furnish all labor, equipment, and material required for the complete installation of plumbing, water distribution, and sewerage system, including all inside and outside gas, water, and sewer piping, fixtures, services, etc.; of heating systems with outside high pressure steam distribution and including all inside piping, radiation, outlets, etc., together with boiler house and incinerator equipment, in accordance with specifications, at U. S. Veterans' Hospital, Aspinwall, Pennsylvania, the work to be completed on or before the expiration of 350 calendar days from date of receipt of notice to proceed.

Notice to proceed was received by the plaintiff July 23, 1924, thereby requiring completion prior to July 9, 1925.

4. Plaintiff proceeded with the contract work. It began operations by working on the outside sewer system. The hospital building was being erected by the United States under a contract with W. F. Trimble & Sons Co., of Pittsburgh, Pa. The electrical work was being done by the Michaels Co., of Norfolk, Va.

The progress that plaintiff made on its entire contract was dependent upon the progress made by W. F. Trimble & Sons Co. While plaintiff was proceeding satisfactorily with its work the employees of the Trimble Co. and of the Michaels Co. went on strike, halting the erection of the building and the electrical work therein.

The Director of the Veterans' Bureau, Frank T. Hines, was very anxious for immediate resumption of work and an early completion of the hospital.

5. The circumstances eventuating in the Trimble and Michaels strike were as follows:

Plaintiff was employing on its work a more or less permanent force, with an established organization. It used the "open shop" and had on its payroll both union and non-union men. From extended service with the company the men had become trained in their work, and the company having installed plumbing in other hospitals, its men were experienced in the installation of hospital equipment and had become expert and efficient therein.

Reporter's Statement of the Case

Shortly after plaintiff's arrival in Aspinwall, on the job, representatives of the local Pittsburgh plumbers' union and steamfitters' union investigated plaintiff's labor and finding it not organized under local union rules of Allegheny Co., in which both Pittsburgh and Aspinwall are located, demanded of plaintiff's president, L. U. Noland, that he discharge his men and employ only members of the local unions in Pittsburgh. This demand Noland refused and in an effort to force acceptance the local Pittsburgh union officials called the Trimble and Michaels men out on a so-called "sympathetic,, strike' they being members of the Pittsburgh unions.

Trimble's and Michaels' employees on the job went out on strike October 25, 1924. Neither Trimble nor Michaels took steps to settle their strike or employ other men and, except for plaintiff's portion, work on the Aspinwall Hospital came to a standstill.

Plaintiff continued with its work during this strike, and was keeping up its scheduled program.

6. A "conciliator" from the Department of Labor was, upon request of Director Hines October 31, 1924, sent to the scene and upon investigation counseled the Director to call a general conference in order to bring an end to the strike and permit resumption of work on all lines.

On November 10, 1924, the Director wired the plaintiff that such a conference would be held in Washington on Thursday (November 13, 1924), inviting it to send thereto a member of the firm.

7. The conference was held, as set by Director Hines, who presided.

Attending the conference were the following, among others:

Frank T. Hines, Director, Veterans' Bureau.

Louis H. Tripp, Director of Construction, Veterans' Bureau.

L. U. Noland, plaintiff's president.

Timothy B. Clifford, plaintiff's vice-president.

Trimble, of W. F. Trimble & Sons Co.

Joseph Charles Michaels, of the Michaels Co.

Fred Keightley, Commissioner of Conciliation, Department of Labor.

Charles J. Lawrence, business representative, Plumbers Local Union, Pittsburgh.

Leo A. Green, secretary, Steamfitters Union, Pittsburgh.

F. O. Reed, secretary, Master Builders Association, Allegheny Co., Pa., and secretary of the Building Trade Employers Association.

At the opening of the conference Director Hines called upon the various representatives to state their viewpoints. Noland stated that his own work was progressing satisfactorily, that he had no trouble and no strike on his hands. Trimble represented that he was powerless in the matter. The Trimble concern was a member of the Master Builders Association of Allegheny Co., whose members employed union labor only. Allegheny Co. was pretty thoroughly organized by union labor. Lawrence and Green demanded that the Noland job be 100 per cent unionized with local men, and stated that otherwise the hospital would not be built. They would not recede from this demand. Keightley expressed the opinion that a contractor when in Rome should do as the Romans did. This opinion Director Hines expressed concurrence in, at the same time vigorously insisting that the parties get together and settle their differences.

Before final adjournment Noland offered to change his personnel by employing 50 per cent of his men from the Pittsburgh local unions, making up the remaining 50 per cent from his present force. This offer the union representatives Lawrence and Green refused, again demanding 100 per cent unionization, and steadfastly refused to moderate this demand.

Finally Director Hines, aroused at the refusal of the union representatives to concede anything, and their assertion that unless the entire job was thoroughly unionized with Pittsburgh men the hospital would not be built, emphatically assured his audience that the hospital would be built by the contractors or the Government would take the contracts over.

The conference was adjourned without agreement.

8. At the time of the conference there had been no breach of any of the three contracts on the Aspinwall Hospital, plaintiff's contract, Trimble's contract, or Michaels' contract.

Immediately after the conference Noland was requested to and did confer with Director of Construction Tripp. At this conference Tripp again urged Noland to come to an agreement with the unions in order that the work might go ahead. Director Hines was kept informed of what was going on between Noland and Tripp. It was apparent to Noland, Tripp, and Hines, from the time of the general conference, that the union representatives would not recede from their demand of complete unionization of plaintiff's force at the hospital site.

Following his conference with Tripp, Noland conferred with the two union officials, Lawrence and Green, at the Washington Hotel, and agreed to change his organization to accord with their demands, on the understanding, among other matters not here material, that the union men would be as good and efficient as Noland's men, and that the wages then being paid would continue.

This concession on Noland's part was promptly made known both to Tripp and to Hines. On November 15, 1924, Director Hines sent to F. O. Reed, secretary of the Master Builders Association, Allegheny Co., the following wire:

> With reference to situation at Aspinwall hospital I understand that Mr. Noland of the Virginia Engineering Company in view of the existing situation and particularly in view of the need for arriving at immediate understanding is prepared to go much further in this matter than he could under any but extraordinary circumstances. Under the circumstances I feel that it is proper to request you on behalf of the Bureau to use your very best efforts to obtain for Virginia Engineering Company an extension of time for putting their agreement into effect from November 24 until December first in order to permit that company to reassign their men now working at Aspinwall to other projects without undue hardship to the men themselves.

The question of extension of time for change of personnel arose from the fact that Lawrence and Green had demanded of Noland, at their conference with him, that his men be

withdrawn within ten days. Noland desired more time and this desire had been communicated to Director Hines.

Plaintiff communicated with the Veterans' Bureau November 18, 1924, by letter setting forth the agreement with the unions, and concluding as follows:

> We want to go on record that we have gone as far with this thing as we possibly can, and by agreeing to do what we have, we have compromised our principles on the Open Shop or American Plan, we have kept poor faith with our loyal employees, we stand to lose at least $6,000.00 on our cost by making this change of men in the middle of the job, all with the idea of hastening the completion of the Hospital, and I want to again state that legally, morally, and fundamentally, we are correct in our position by operating on the basis of the American Plan Shop. Our work is satisfactory, our progress is satisfactory, we have no strike and from past performances with your Bureau and with other Governmental Departments in Washington, our work has always been satisfactory.

This was followed by another letter to the Veterans' Bureau November 19, 1924, asking if the bureau would insist on plaintiff's discharging its men and "employing strictly Pittsburgh union men."

Director Hines did not directly answer this inquiry, but replied by letter of November 21, 1924, that it had been reported to him that the strike was over, at which he was gratified, concluding:

> I believe that you have acted very wisely in this matter and wish to express my appreciation on the part of the Bureau of your action in bringing about a settlement which otherwise appeared impossible of achievement without difficulty and delay which would undoubtedly have been injurious to all concerned.

On November 22, 1924, Director Hines replied to the letter of November 18, 1924, in part as follows:

> It is my understanding that the terms of your agreement, as set forth on pages three and four of your letter under numbered paragraphs, are correct.
>
> I wish again to express my appreciation of your attitude throughout the entire discussion of the situation at Aspinwall and of your action which has per-

mitted a settlement of the matter which will permit the construction of this hospital to proceed in spite of various obstacles which you have had to overcome in order to accomplish this end.

On November 24, 1924, the plaintiff wrote Director Hines as follows:

> Receipt is acknowledged of your letter of the 21st instant relative to the strike situation at the Aspinwall Veterans' Hospital. We note that you received our letters of November 18th and 19th, setting forth our position in the matter and I am afraid that you are working under a misapprehension. The strike is settled for the time being and we hope definitely and permanently. At least we are sure there will be no trouble until after the 29th inst.
>
> We set forth in our letter of the 18th our position and we have agreed to practically everything demanded with the exception of one or two items and up to this time we have not as yet received their approval. Personally, I do not believe they will call the men off again, but before we give in to them entirely we must be assured of a square deal.

The record does not disclose that Director Hines responded to this letter of November 24, 1924, by assuring the plaintiff of "a square deal." Thereafter, he again expressed his appreciation of the concessions made by plaintiff.

9. Plaintiff changed its force to meet the final demands of the unions, and the force on plaintiff's job, with few exceptions, was unionized with members of Pittsburgh locals sent to the project by Lawrence or Green.

Shortly after taking over the work, and on December 1, 1924, the unions demanded an increase in wages from $1.25 to $1.37½ per hour, to which demand plaintiff had to accede.

In the fore part of January 1925 the unions demanded an increase in pay, retroactive to the first of the month, of 50 cents per day. This, after notice to Director Hines, was granted by the plaintiff.

In March of 1925 a general strike was called of steamfitters in the Pittsburgh area, which included Aspinwall, for higher wages, which affected plaintiff's work. They were out about two weeks and then went back to work without

gaining their object. Plaintiff's time for performance was extended to cover the delay resulting from this strike.

Early in December 1924 the unions demanded of plaintiff free transportation from the railroad station to the Veterans' Hospital. The hospital is located on a hill about half a mile from the railroad station. The men traveled from Pittsburgh to Aspinwall by rail. Plaintiff's own force had stayed in Aspinwall and did not require or demand free transportation to the hospital. Plaintiff complied with the union demand and transported the men in two trucks.

The unions then demanded working pay for the time it took them to travel from their Union Hall in Pittsburgh to the site of the job. Plaintiff complied with this demand for travelling pay, amounting to one and a half hours per day.

The next demand of the unions was for payment of the round trip fare between Pittsburgh and Aspinwall of $1.20 per man. This demand plaintiff also complied with.

The unions also demanded a pay-off during working hours. This amounted to half an hour per week per man. This demand was also complied with.

All these demands were complied with by the plaintiff by force of the circumstances herein recited. To have refused them would again have brought labor disturbances on the project.

10. The men furnished by the Pittsburgh union locals did not as a whole work with the skill, industry, and loyalty as had the force of men they supplanted. They were comparatively inexperienced in the installation of hospital equipment, were out of the control of plaintiff, and worked under the direction of their own shop stewards. In many instances where plaintiff had employed helpers to assist steamfitters and plumbers, the unions supplied steamfitters and plumbers. Helpers are paid a much lower wage than plumbers and steamfitters.

The practical effect of this situation was to relegate plaintiff solely to the position of paymaster.

The work was performed in such manner by the men supplied by the Pittsburgh union locals that the work was delayed and labor and other costs materially increased over the amount plaintiff had estimated in its bid.

11. By reason of change orders the contract price had been increased to $211,417.35. In this amount was included a profit of $20,000 anticipated by the plaintiff. Due to the change in plaintiff's personnel on the job, as hereinabove described, there was an increase of $71,069.65 in plaintiff's labor cost over what it would have been, exclusive of profit, had he retained his own force. On materials plaintiff made a saving of $11,316.58 on its estimated cost, exclusive of profit, as reflected in the bid. On miscellaneous items plaintiff had an increase in cost of $2,880.51 over the estimate, exclusive of profit, included in the bid. The increase in cost over the estimate was therefore $62,633.58. Deducting therefrom the anticipated profit of $20,000 paid in the contract price gives a net loss to the plaintiff of $42,633.58.

The saving in material and the increase in cost of miscellaneous items did not arise from the change in personnel.

Plaintiff's estimate of labor costs, making up its bid, is reasonably accurate.

12. Before plaintiff changed its working force at Aspinwall the Director of the Veterans' Bureau urged plaintiff and thereafter constantly encouraged it to make concessions to the local labor unions at Pittsburgh, and adopt a conciliatory attitude toward them, in order that the hospital might be available to the United States for its use at an early date. Both parties knew that to make concessions to these particular unions and adopt a conciliatory attitude toward them, necessarily meant that plaintiff would have to meet their demands fully as regards local union rules, and that plaintiff would have to make practically a 100 per cent turn-over of its force in the hospital building.

As an ultimate finding of fact, drawn from the facts hereinbefore found, and all the proof of record, it is found (1) that the Director of the Veterans' Bureau requested plaintiff to take the course it took with respect to the labor situation at Aspinwall; (2) that the plaintiff, relying on this request, complied therewith; (3) that as a result thereof plaintiff incurred an extra cost of $71,069.65, which it would not otherwise have incurred.

13. On May 2, 1925, the Director of the Veterans' Bureau ordered plaintiff's work accepted as complete.

The court decided that the plaintiff was entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the court:

This case comes to this court under a Special Jurisdictional Act conferring jurisdiction to—

> hear and determine the claim of the Virginia Engineering Company (Incorporated), and to award just compensation for extra costs, if any, incurred in complying with requests, if any shall be found to have been made and complied with, of the Director of the Veterans' Administration incident to the work performed under contract of June 24, 1924, for equipping the Veterans' Administration Hospital at Aspinwall, Pennsylvania, and to enter decree or judgment against the United States for such just compensation, if any, notwithstanding the bars or defense of lapse of time, laches, or any statute of limitation. 49 Stat. 2257.

There are two questions which confront the court. The first is—was any request made by the Director of the Veterans' Administration of plaintiff, incident to the work to be performed under plaintiff's contract, which caused it to incur extra costs? The second is—if extra costs have been incurred through such request, is plaintiff entitled to receive not only the amount of the extra cost but an additional amount as part of just compensation to the date of payment in order to make plaintiff whole for the extra cost incurred?

The first question is one of fact; the second is one of law and is contingent upon an affirmative finding on the first question.

In 1924 the Veterans' Bureau, desiring to establish and erect a hospital at Aspinwall, Allegheny County, Pennsylvania, entered into a contract with W. F. Trimble & Sons Co., of Pittsburgh, Pa., for the erection of the building and with Michaels Company, of Norfolk, Virginia, for the electrical work. A contract was entered into between plaintiff and defendant on June 24, 1924, whereby for the sum of $191,806, plaintiff agreed to furnish all labor, equipment and material required for the complete installation of plumbing, water distribution, and sewer system, including

all inside and outside gas, water, and sewer piping, fixtures, services, etc.; of heating systems with outside high pressure steam distribution and including all inside piping, radiation, outlets, etc., together with boilerhouse and incinerator equipment, in accordance with specifications, at U. S. Veterans' Hospital, Aspinwall, Pennsylvania, the work to be completed on or before the expiration of 350 calendar days from the date of receipt of notice to proceed.

On July 23, 1924, plaintiff was notified to proceed and therefore the completion date was to be July 9, 1925.

Immediately upon the receipt of the notice to proceed plaintiff entered upon the work and began operations by working on the outside sewer system. The nature of the work under plaintiff's contract necessarily was dependent upon the work of the contractor who was to erect the building. The progress which plaintiff could make inside of the building was dependent entirely upon the progress made by the contractor who had the contract for its erection.

The evidence shows that plaintiff brought to his work satisfactory and efficient workmen and proceeded with the work under his contract in a satisfactory and efficient way. There was no complaint about plaintiff's work or about its workmen or the skill of its workmen. These workmen had been employed by the plaintiff for some time and had satisfactorily worked on other buildings. Plaintiff conducted an "open shop" with no labor disputes, and employed both union and non-union workers, who had become trained in their line of work through extended service with plaintiff in installing plumbing in other hospitals and were experienced in the installation of hospital equipment.

Shortly after plaintiff had arrived in Aspinwall, representatives of the Pittsburgh Union investigated plaintiff's labor organization, and, finding that it was not organized under the local rules which required none but union men to be employed, demanded that plaintiff discharge the non-union men and employ solely those who belonged to the local unions in the Pittsburgh district. This demand plaintiff refused to meet and, as a result of this refusal, a "sympathetic" strike was called by the unions and the union

men employed on the work being performed by the W. F. Trimble & Sons Company, which had the contract for the erection of the building, and those employed by the Michaels Company were taken off the work. As a result of this strike the work was stopped on the main building as was the electrical work. Only the men employed by plaintiff continued to perform the work under plaintiff's contract. Neither of the other contractors attempted to settle the strike or to provide other men for the work. The strike occurred on October 25, 1924.

At the request of Director Hines of the Veterans' Bureau a "conciliator" from the Department of Labor was sent to the scene and, upon investigation, counseled the Director to call a general conference in order to bring to an end or to settle the strike and have a resumption of work on all contracts. Acting upon this advice, the Director called a conference in Washington on November 13, 1924, and wired the plaintiff to send a member of its firm to attend the conference.

When the conference was held Director Hines presided and among those present were his Director of Construction; plaintiff's President and Vice President; a representative of W. F. Trimble & Sons Co.; a representative of Michaels Company; the Commissioner of Conciliation, Department of Labor; a representative of the Plumbers' Local Union, Pittsburgh; the secretary of the Steamfitters' Union, Pittsburgh; and a representative of the Master Builders' Association, Allegheny County, Pa., and of the Building Trade Employers' Association. General Hines called upon the various representatives to state their viewpoint. The union representatives demanded that plaintiff's force be unionized one hundred per cent. The representatives of the other two contractors stated that they were powerless to do anything in the matter. Plaintiff's representatives stated that work on its contract was progressing satisfactorily and that it had had no trouble with its labor and there was no strike among its men. General Hines made a vigorous speech urging settlement of the strike and insisted that the parties get together and settle their differences.

At that time General Hines knew that the only difference was the fact that plaintiff was operating an "open-shop" and that the unions in the county in which the hospital was being erected had demanded that plaintiff's force be completely unionized. That was the sole issue before the conference. General Hines also knew, and was at that time informed, that plaintiff was complying with its contract and that the work was satisfactorily progressing. Representatives of plaintiff, realizing that something had to be done, suggested that plaintiff would go so far in settling the matter as to unionize fifty percent. This was refused by the union representatives. General Hines was so aroused at the refusal of the parties to get together that he vigorously asserted that the hospital had to be built, that the Veterans' Bureau needed the cots and, unless a settlement was made, he would take over the contracts.

After the conference had adjourned plaintiff held conferences with the Director of Construction of the Veterans' Bureau and was urged to come to an agreement with the unions in order to settle the strike and allow the work to progress. General Hines was kept fully informed by his Director of Construction of what happened in the conferences with plaintiff after the general conferences had adjourned. After many conferences with the Director of Construction and the union representatives, plaintiff finally had to accede to the demands of the union which meant that he had to employ only union men approved by the local unions and to pay the scale of wages demanded by the unions. General Hines was informed of this by letter from the plaintiff and in reply he stated to plaintiff "You have acted very wisely in this matter" and that a settlement had been achieved when it had appeared impossible before plaintiff acceded to the unions' demands. In the second letter Director Hines stated:

> I wish again to express my appreciation of your attitude throughout the entire discussion of the situation at Aspinwall and of your action which has permitted a settlement of the matter which will permit the construction of this hospital to proceed in spite of various obstacles which you have had to overcome in order to accomplish this end.

Taking into consideration all the facts, statements, and surrounding circumstances which caused the "sympathetic" strike; the interjection of himself into the matter by General Hines in calling the general conference and his vigorous insistence that the strike be settled; and the letter of commendation to the plaintiff stating that plaintiff had acted wisely by acceding to all of the demands of the union when he knew that by so doing plaintiff not only had to incur extra cost and expense but had to discharge faithful and efficient workers who were then on the job, it is inevitable to conclude any other way than that plaintiff acted upon the request and demand of General Hines to give way in this matter and plaintiff therefore met the demands of the union regardless what the extra cost was to it. The very threat of termination of the contracts and the taking over of the work by the Veterans' Bureau, which General Hines made at the general conference, was in the nature of duress on plaintiff to force it to meet the demands of the union. Especially is this true when it is taken into consideration that at the very time this conference was being held, and prior thereto, plaintiff was performing its contract in a satisfactory and progressive manner and there was no strike or dissatisfaction in its labor force. No other conclusion can be drawn from the events as they occurred and culminated in the conference called by General Hines and the results which followed. In our judgment, and we have so found, plaintiff acted in response to the request of General Hines and the extra cost which it incurred was due entirely to this request for plaintiff to meet the demands of the union.

Plaintiff is entitled to recover the extra cost. We have found as an ultimate fact that plaintiff has incurred an extra expense of $71,069.65.

The Jurisdictional Act permits plaintiff to recover just compensation. This extra cost involves a loss under a contract which, ordinarily, would not entitle plaintiff to any more than the actual loss sustained. However, Congress has seen fit to grant plaintiff the right to recover not only the extra cost incurred at the time of the completion and acceptance of the work but, in addition thereto, an added sum which will make plaintiff whole to the date of payment.

Opinion of the Court

It has been repeatedly held by this court and the Supreme Court in numerous cases that just compensation includes not only the value of the thing taken but, in addition thereto, interest from the date of taking to the date of payment, not as interest, but as a measure of compensation. See *Wheeling Steel Corporation* v. *United States*, 71 C. Cls. 571, 572; *Nitro Powder Company* v. *United States*, 71 C. Cls. 369, 374; *DeLaval Steam Turbine Co.* v. *United States*, 70 C. Cls. 51, 67, 68, affirmed by Supreme Court, 284 U. S. 61; *John Russell Smith* v. *United States*, 67 C. Cls. 182, 210; *Luckenbach S. S. Co.* v. *United States*, 64 C. Cls. 59; *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, 306; and *William Wrigley, Jr.* v. *United States*, 75 C. Cls. 569.

Defendant argues that when Congress used the words "just compensation" it was not intended in the sense in which it is used in the fifth amendment of the Constitution in reference to taking of private property under the power of eminent domain, but in the nature of damages sustained under a breach of contract. We can not take this view of the use of these words in the Act. It is a well-known rule of statutory construction that where judicial interpretation has been placed on the use of certain words over a lapse of time, Congress in the use of those words in subsequent statutes meant them in the light and meaning as placed upon them by the courts. In this case the use of the words "just compensation" had been employed in many other statutes by Congress and when these statutes came for determination before the courts, in every instance the courts held that they meant the value of the thing taken from the time of taking to the date of payment with an added amount to make the parties whole. There can be no other construction placed upon the use of these words. Congress has the right to give plaintiff any relief it may see fit to accord it and this case is removed from one sounding in damages to one that falls under the eminent domain class. It is a special relief granted by Congress to this plaintiff under special circumstances for the purpose of granting special recovery. *The Case of the Sewing Machine Companies*, 18 Wall. 553, 584; *The "Abbotsford,"* 98 U. S. 440, 444; *United States* v. *Mooney*, 116 U. S. 104, 106; *Kepner* v.

United States, 195 U. S. 100, 124; *United States* v. *Merriam*, 263 U. S. 179, 187; and *Hecht* v. *Malley*, 265 U. S. 144, 153.

The defendant has brought to our attention the case of *Tillson* v. *United States*, 100 U. S. 43. This case is not apposite. The Special Jurisdictional Act in this case called for "the amount equitably due" and not just compensation. The Supreme Court held that the word "equitably" meant "no more than that the rules of law applicable to the case shall be construed liberally in favor of the claimants", and that interest is not allowed on claims up to the time of the rendition of judgment under the Statute organizing the Court of Claims, unless the contract expressly provides for interest. We have allowed plaintiff nothing as interest, but only an amount which is included in what is meant by just compensation as interpreted by the courts.

Plaintiff is entitled to recover $71,069.65, with interest at the rate of six per cent per annum from May 2, 1925, to the date of payment, not as interest, but as a part of just compensation in order to make the plaintiff whole. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* and GREEN, *Judge*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

JAMES A. COUNCILOR & WM. GORDON BUCHANAN, PARTNERS, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF COUNCILOR & BUCHANAN v. THE UNITED STATES

[No. 43469. Decided November 6, 1939]

On the Proofs

Government contract; hours constituting a day's work.—Where a Government agency, the Farm Credit Administration, engaged the services of a firm of public accountants to make an audit and in the agreement fixed the compensation on a per diem basis, but did not state the number of hours which would constitute a working day, it is held that the number of hours considered as a day's work are to be determined by the established usage and practice in the accounting profession.

The Reporter's statement of the case:

Mr. Robert A. Littleton for the plaintiff. *Mr. Edwin R. Boyd* was on the briefs.

Mr. Paul A. Sweeney, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiffs are partners, under the firm name and style of Councilor & Buchanan, with offices in Washington, D. C., and are engaged in the accounting business.

2. November 4, 1933, after preliminary conferences, the following letters were interchanged between plaintiffs and the Farm Credit Administration.

From the Farm Credit Administration to the plaintiffs:

> Certain developments in connection with the operations of the Federal Land Bank at Omaha, Nebraska, make it desirable that an audit of the books and records of that Bank be made by someone not heretofore connected with the administration or examination of land banks.
>
> I should like to know whether your organization would be willing to undertake to make such an audit; the extent and period to be determined by this office after the project is underway. If you are in a position to do this work will you please submit a proposal covering the basis of your charges.

From the plaintiffs to the Farm Credit Administration:

> Answering your letter of today, our organization has had considerable experience in the handling of engagements similar to the audit which you are contemplating of the Federal Land Bank at Omaha, Nebraska, and we are in a position to handle such an engagement promptly.
>
> We shall be glad to undertake this work on a basis of a per diem of Fifteen Dollars ($15.00) per day for juniors and Twenty-five Dollars ($25.00) per day for seniors plus traveling expenses and subsistence for those of our staff whose headquarters are located outside of Omaha.
>
> Awaiting your further instructions and trusting that we may have the privilege of doing this work, I am

3. Plaintiffs were hired by the Farm Credit Administration to do the work mentioned, and the terms of the contract of hire were reduced to writing by the Farm Credit Administration in a letter to plaintiffs December 21, 1933, as follows:

> You are hereby authorized to make an audit of the Federal Land Bank at Omaha, Nebraska, under the terms and conditions set forth in your letter of November 4, 1933.
>
> As a result of our discussion of the details of your proposal, the following conclusions have been reached:
>
> Your compensation under this contract, payable upon completion of this audit and the submission of the report, will be based upon the per diem rates of $25 a day for senior accountants and $15 a day for junior accountants. In addition, you will be reimbursed for the amount expended for actual and necessary traveling expenses, including a per diem of $5 in lieu of subsistence, for each accountant engaged in this audit whose headquarters or domicile is not at Omaha, such per diem to be payable for each day's absence from headquarters or domicile on this assignment, with the exception of days other than Sundays or holidays when the accountant is not working or in a travel status. These compensation rates will apply to all days upon which the accountants actually work on this audit, which may include Sundays and holidays, and will include the time consumed by each accountant in traveling from his headquarters to Omaha and in returning to headquarters; Sundays and holidays consumed in this travel to be treated as days actually worked.
>
> It is understood that in order to reduce the cost to a minimum, routine work such as adding machine listing and typing will be performed as far as practicable by persons selected by you and paid by the Federal Land Bank of Omaha.
>
> It is understood further that in the event an accountant, upon the completion of this assignment, does not return to his headquarters, but proceeds to a new assignment elsewhere, the per diem compensation charge and travel expense, including per diem in lieu of subsistence, shall be limited to an amount no greater than would have been incurred had he returned to his headquarters, with the qualification that if the actual expense is less, the Government is obligated to pay only the lesser amount It is understood further that under the terms

of this contract, you will be reimbursed for the cost of any travel that may be reasonably necessary in connection with the audit, such travel to be performed by the customary means of transportation and be authorized and approved in advance by this office.

I am inclosing herewith a supply of Standard Form No. 1034, Public Voucher for Services Other Than Personal, and Standard Form No. 1012, Public Voucher for Reimbursement for Travel and Other Expenses, Including Per Diem. Upon completion of the audit and submission of the audit report, it is requested that you present a voucher, in duplicate (Form No. 1034), for the amount due you under this contract, stated in two items—

the total amount due you on the basis of the compensation per diem allowances, supported by a separate schedule showing the name of each accountant, his designation, and the days actually worked,

and the other the total amount paid by you for travelling expenses, including per diem in lieu of subsistence, supported by Form No. 1012, in duplicate, executed by each traveller.

The standard form of affidavit may be amended, as far as necessary to fit the circumstances, and should show that payment to the traveller has been made by you.

4. The plaintiffs agreed to the terms of the letter of December 21, 1933, and performed the work assigned to them.

In the course of performance certain of their personnel, in addition to working 7 hours or more before 7 p. m. during the day, worked at their tasks after 7 p. m.

5. Plaintiffs, after the work had been completed, submitted their bill therefor to the Farm Credit Administration, claiming a full day's rate for work up to 7 p. m. and a proportionate day's rate based on a 7-hour day for work performed after 7 p. m. Thus, where a senior accountant worked 9 hours up to 7 p. m., and after 7 p. m. 3½ hours, plaintiffs billed against the United States and claimed $37.50, being $25 for the 9 hours as one day, and $12.50 for the 3½ hours as one-half a day, being one-half of 7 hours.

While plaintiffs' bill was being audited by the Farm Credit Administration, the Administrative Assistant stated in a letter to plaintiffs dated October 8, 1934, in part, as follows:

Reporter's Statement of the Case

> Although my letter to you of December 21, 1933, does not specifically provide therefor, your claim for services includes, in addition to the per diem allowance of $25.00 for seniors and $15.00 for juniors, an overtime allowance representing services performed after seven o'clock, P. M., at the rate of 1/7 of the per diem allowance for each hour of overtime work, eliminating time devoted to conferences held during the evening hours. This claim for overtime is made in accordance with your understanding of my letter to you of December 21, 1933, specifying the per diem rates to be allowed. Your interpretation would permit per diem charges to be billed in accordance with the well-established practice in the accounting profession where the desire of clients, as was the case in this examination, is that the examination shall be completed as rapidly as possible and without serious interference with the regular work of the institution examined, during regular business hours.

6. The Government's accounting officers refused payment in full as rendered, on the ground that all work done on a calendar day must under the contract of hire be considered and calculated as one day of work only. Thus, in the example cited, the senior accountant's services for a day of 16½ hours would be paid for under the contract as one day only, amounting to $25 and no more.

7. There were other matters excepted to by the accounting officers, not here involved.

The difference arising between plaintiffs' method of calculation and the Government accounting officers' method of calculation, is $6,773.56, which was again claimed by the plaintiffs and again denied, and is here sued for.

8. It is a custom and has been for many years in the accounting profession to treat 7 hours as a day's work in the computation of wages for an accountant who is employed on a daily basis, work beyond 7 hours in one calendar day being treated as overtime. In a contract of the sort here in suit it is not and has not for many years been customary to specify that a day's work, for which a day's wage is due, shall consist of a set number of hours, and where a rate per diem is stated in the contract, it is and has been taken in the profession to mean that much for a period of 7 hours,

and more or less in the ratio that the excess or deficiency in time bears to 7 hours.

9. The so-called "overtime" work, or work performed after 7 p. m., was necessary for expedition, which was urgent and greatly desired by the Farm Credit Administration; was also necessary for the reason that certain books and papers of account were being used by the bank at Omaha during daylight hours and in practice available to plaintiffs' accountants only after the bank's office hours.

The court decided that the plaintiffs were entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the court:

Plaintiffs entered into an agreement with the defendant, acting through the Farm Credit Administration, to make an independent audit of the Federal Land Bank of Omaha, Nebraska, and are suing to recover a balance which they claim as compensation under that agreement.

There is no denial that an agreement was entered into. The sole question is the construction to be placed on the technical or equivocal terms which appear on the face of the agreement.

The Farm Credit Administration, being anxious to have an independent and expeditious audit of the Federal Land Bank at Omaha, employed the plaintiffs to perform the work and in the agreement fixed the amount to be paid at $15 per diem for junior accountants and $25 per diem for senior accountants plus traveling expenses and subsistence for those whose headquarters were located outside of Omaha.

When plaintiffs' accountants worked until 7 P. M. they charged the per diem rate for that time. There were certain books of account of the bank which were necessary for the proper functioning of the bank during these hours and which were not accessible and could not be used by the accountants. At times it was necessary for the accountants to perform work after 7 P. M. when these books were available and plaintiff's accountants then remained at the bank and worked at night. It is for this extra work that plain-

tiffs charged one-half of the per diem rate, that is, $12.50 in the case of senior accountants, and $7.50 for junior accountants, and for which amount they are now suing. In order to make a proper and expeditious audit it was absolutely necessary to have these books, otherwise the audit would not reflect the true condition of the bank.

The agreement called for a "per diem" payment but it did not state the number of hours which would constitute a working day. Under its general terms plaintiffs' accountants could work one hour and claim a full per diem charge or could work twenty-four hours and the same per diem would be paid. This is not a reasonable way of looking at a contract or agreement.

The question comes down to what is meant by the words "per diem" and, as the agreement is vague and indefinite as to what a day's work should be, it is necessary to resort to the usage or custom of the trade in order to ascertain what a day's work is, not for the purpose of controlling the rules of law or contradicting the agreement of the parties but solely to make plain a doubtful expression in the contract.

The evidence in the case establishes that seven hours constitute a day's work in accounting and auditing and all time over seven hours is charged as part of another per diem in proportion to the number of hours worked. It seems to be almost universally established today that seven hours constitute a day's work. Almost throughout the entire Federal Service seven hours are considered a day's work. It is true, however, that most of these positions are salaried positions and when overtime work is performed no extra pay can be allowed due to the fact that these positions carry a yearly salary and the Government appropriates no money for overtime work. The services rendered after hours are purely gratuitous and performed patriotically.

The Federal Farm Credit Administration has paid plaintiffs on the basis of $25 per diem for the senior accountants and $15 per diem for the junior accountants and recommended payment to plaintiffs for the overtime work performed, but the Comptroller General disapproved this allowance, holding that plaintiffs could only receive one per diem charge during twenty-four hours, no matter how many

hours of work were performed. We do not feel that this is a fair and reasonable interpretation of the agreement.

In the case of *P. Franz & Co., Inc.* v. *Larney*, 176 N. Y. S. 26, 27 (1919), the court said:

> * * * I think we may fairly assume that, where no time is mentioned in an agreement to labor or perform services "by the day," the parties must be presumed to have contracted with reference to a working day. That being so, it was incumbent on the defendant to show conclusively that the contract was for a day of 24 hours.

In *Hinton* v. *Locke*, 5 Hill, 437, 439, the court said:

> But in the case at bar the usage or custom did not go to vary the contract. It went to explain and ascertain the intention of the parties in relation to a matter upon which the contract was silent. Usage can never be set up in contravention of the contract; but when there is nothing in the agreement to exclude the inference, the parties are always presumed to contract in reference to the usage or custom which prevails in the particular trade or business to which the contract relates; and the usage is admissible for the purpose of ascertaining with greater certainty what was intended by the parties. The evidence often serves to explain or give the true meaning of some word or phrase of doubtful import, or which may be understood in more than one sense according to the subject matter to which it is applied. Now here, the plaintiff was to be paid for his workmen at the rate of twelve shillings *per day;* but the parties have not told us by their contract what they meant by a day's work. It has not been pretended that it necesarily means the labor of twenty-four hours. How much then does it mean? Evidence of the usage or custom was let in to answer that question. And when we find a universal usage in this business to call ten hours' labor a day's work, we have arrived at the true meaning of the word *day*, as used in this contract.

In the case of *Hurst* v. *W. J. Lake & Co., Inc.*, 141 Oregon 306, 16 Pac. (2d) 627, 631, the court said:

> * * * We believe that it is safe to assume, in the absence of evidence to the contrary, that, when trades-

men employ trade terms, they attach to them their trade significance. If, when they write their trade terms into their contracts, they mean to strip the terms of their special significance and demote them to their common import, it would seem reasonable to believe that they would so state in their agreement. Otherwise they would refrain from using the trade term and express themselves in other language. We quote from *Nicoll* v. *Pittsvein Coal Co.* (C. C. A.), 269 F. 968, 971: "Indeed when tradesmen say or write anything, they are perhaps without present thought on the subject, writing on top of a mass of habits or usages which they take as matter of course. So (with Prof. Williston) we think that any one contracting with knowledge of a usage will naturally say nothing about the matter unless desirous of excluding its operation; if he does wish to exclude, he will say so in express terms. Williston, Contracts, § 653." Nothing in the contract repels the meaning assigned by the trade to the two above terms unless the terms themselves reject it. But, if these terms repel the meaning which usage has attached to them, then every trade term would deny its own meaning. We reject this contention as being without merit. We have considered all other contentions presented by the respondent, but have found no merit in them.

Although the Comptroller of the Treasury, in the case of *Services of Accountants in Examination of Accounts of Isthmian Canal Commission*, 12 Decisions of the Comptroller of the Treasury, 470, held that only one per diem could be paid, in *Fox Brothers & Company*, 12 Decisions of the Comptroller of the Treasury, 420, he held that—

> The contract under which the rope was bought did not specify whether the delivery and payment should be made on the gross or net weight. In the absence of such provision the usage of the trade may be shown to explain the method of delivery and payment. (*Robinson* v. *United States*, 13 Wall, 363, 365.)
>
> The papers submitted by you show that it is the usage of dealers and manufacturers of manila and sisal rope to bill it at gross weight in all cases where there is not a special contract for net weight, and that such gross weight includes the necessary burlap and cordage to prepare it for shipment.

Under the facts appearing from the papers transmitted the same principle should be applied in the settlement of this claim that was applied in the claim of the National Lead Company, decided by this office June 27, 1905 (33 MS. Comp Dec., 1411).

You are authorized to pay the claim on the basis of gross weight if otherwise correct.

It is impossible to believe that the Farm Credit Administration, which requires accounting services to be performed in its several banks throughout the country, was ignorant of, and did not know, the custom and usage among accountants. Defendant made but a faint attempt to prove lack of knowledge by the production of one witness who had nothing to do with the making of this agreement, but there is in the record a letter from the Administrative Assistant of the Federal Farm Credit Administration, dated October 8, 1934, in which he states:

* * * Your interpretation would permit per diem charges to be billed in accordance with the well-established practice in the accounting profession where the desire of clients, as was the case in this examination, is that the examination shall be completed as rapidly as possible and without serious interference with the regular work of the institution examined, during regular business hours.

We conclude that the contract was made in accordance with the custom of the trade of the accounting profession, which provided that work of seven hours constituted a working day and all hours after that were to be computed as part of another day's work and to be paid for in the proportion that the number of hours worked bears to the per diem rate.

We are of the opinion that recovery should be had. Plaintiffs are entitled to recover $6,773.56. It is so ordered.

WILLIAMS, *Judge;* and GREEN, *Judge*, concur.

WHITAKER, *Judge*, and LITTLETON, *Judge*, took no part in the decision of this case.

PARK CLUB, A CORPORATION, v. THE UNITED STATES

[No. 43530. Decided November 6, 1939]

On the Proofs

Internal Revenue; taxes on club dues and initiation fees.—Where facilities for social activities were provided by a club not to induce its members to attend its luncheons but because such activities were an essential part of its life, it is held that it was a social club in the meaning of the provisions of section 501 of the Revenue Act of 1926, as amended.

The Reporter's statement of the case:

Mr. Wilbur A. Giffen for the plaintiff.

Mr. Fred K. Dyar, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Mr. Robert N. Anderson* was on the brief.

The question presented in this case is whether or not the plaintiff was a social club during the period from February 1, 1930, to November 1, 1933, and as such was liable for tax imposed by section 501 of the Revenue Act of 1926, as amended by section 413 of the Revenue Act of 1928. The plaintiff insists that it was not a social club, but a luncheon club only.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff was a corporation organized under the laws of the State of Michigan, and is located in the City of Kalamazoo, Michigan.

Plaintiff was originally incorporated on February 24, 1904, for a term of thirty years. The purpose clause in its charter was, "To promote social intercourse among its members and to provide for them the convenience of a club house."

2. On February 24, 1934, plaintiff filed a claim for refund for taxes paid from February 1, 1930, to November 1, 1933, on dues and initiation fees under the provisions of Section 501 of the Revenue Act of 1926, as amended by Section 413

of the Revenue Act of 1928, in the sum of $11,200.50. Said claim was based on the contention that the plaintiff was not operating as a social, athletic, or sporting club, as contemplated by the taxing act. This claim for refund was rejected by letter of March 20, 1935, rejection being based as to part of the claim on the bar of the statute of limitations, and as to the remainder, $10,214.50, the amount here involved, because, in the opinion of the Commissioner of Internal Revenue, the plaintiff was a social club. In the Commissioner's letter of rejection it is stated:

> Careful consideration has been given to the evidence submitted. It is held, in view of the purposes of the club, as set forth in its articles of association, the clubhouse and facilities maintained for the use of its members, and the social features, such as card playing, ladies' bridge and tea parties, "open house" on New Year's day, etc., that the social features form a material purpose of the club and that it qualifies as a social club or organization within the meaning of section 501 of the Revenue Act of 1926, as amended by section 413 of the Revenue Act of 1928. The dues and fees paid by the members are subject to the tax under the provisions of the above-mentioned section of the Act.

3. The By-Laws of the plaintiff provided that the officers should be a president, vice president, secretary, and treasurer and that a Board of Directors of nine members should control its affairs. There was a financial committee, a house committee, and at different times a special membership committee.

The club staff consisted of a manager, bookkeeper, a chef and two cooks, a dishwasher, and four waiters; also a porter, a maid, a cigar clerk, and a bell boy.

The average number of members for the years covered by this suit was 202. The number ranged from 264 members at the beginning of the period to 120 at the end, the drop being due to the general business depression. About ten percent of such total represented nonresident members, and included in such total were, on the average, four special members representing widows and unmarried daughters of deceased members who were allowed to con-

tinue the membership but without voting privileges. The membership presented a cross section of the community, including businessmen and manufacturing executives, lawyers, doctors, accountants, and men who had retired.

All wives and unmarried daughters of members had the privilege of the facilities of those parts of the club property in which women were allowed. This covered opportunities for dining and entertaining.

Over 75 percent of the members were over 45 years of age. The dues were $12.50 per month for resident members, and $5.00 per month for nonresident members. In lieu of an initiation fee, a new member was required to purchase a share of stock of the plaintiff corporation either from another owner or from the plaintiff at a price to be determined from time to time by the Board of Directors. Such price ranged from $100.00 to $300.00. No member could hold more than one share of stock.

4. Kalamazoo, Michigan, was a city of 58,000 population, with manufacturing—mainly paper making—the chief activity. The clubhouse was an old residence which plaintiff purchased in 1926 and was located within one block of the business section and about two blocks off the main street. The building was constructed of red brick and red sandstone trim and was irregular in shape measuring roughly 40 feet in width and 90 feet in length. The lot on which the building stood was 60 feet by 132 feet, the back part being used for parking space for about 15 cars of the members. The plaintiff also owned the adjoining 60-foot vacant grassed lot, which was also used as an entrance to the parking lot. On the books the permanent assets of the plaintiff were carried at the following figures which represent the balances after deducting depreciation as of December 31, 1933: land and building, $113,654.72; and equipment and furnishings, $26,334.53.

5. The club building consisted of three stories and a basement. The equipment and furnishings of the club were substantial, attractive, and comfortable.

The basement had three dining rooms, 20 feet by 25 feet, 15 feet by 15 feet, and 12 feet by 25 feet, respectively. The

aggregate seating capacity of these rooms was from 48 to 60 persons. In the basement there was also a kitchen, pantry, waiters' dressing room, food storage rooms, etc. All members were served luncheons here unless they had outside guests.

On the first floor there was located an entrance lobby, 14 feet by 20 feet, a lounge room, three dining rooms, a pantry, a washroom, and a ladies' dressing room to which there was a back private entrance which the ladies were required to use. From the entrance lobby, stairways led to the second floor and basement. In the lobby was a hat rack, cigar counter, and some furniture. A bulletin board was maintained in the lobby upon which were posted daily stock quotations. The lounge room which opened on an outside porch was 15 feet by 30 feet and contained two davenports, easy chairs, reading lamps, and a library table on which there were newspapers and magazines. The north dining room was 15 feet by 22 feet and had a table capacity for 14 persons. The middle dining room was 20 feet by 25 feet and contained six tables seating 16 to 20 persons. The south dining room was 14 feet by 30 feet and had a number of small tables. The latter dining room connected with the ladies' room. The two rear dining rooms were used by ladies or by mixed gatherings, and the various dining rooms on the first floor served all purposes except the noonday luncheon of the men members, which was served in the basement grill.

On the second floor there was a hallway which connected with a lounge room, four card rooms, office, a pantry, a washroom, and some storage space. The lounge was 36 feet long and of irregular width and contained davenports, desks, easy chairs, and lamps. Each of the card rooms had a table. Three of the tables were for four players each and one for six. The office occupied a space 12 feet by 12 feet.

On the third floor there was located a large room 40 feet by 50 feet, which was used once annually for a New Year's Eve dance. Once during the period in controversy this room was rented to one of the members for a dance. This room was equipped with a piano, chairs, and settees. On this floor there was also located a small bedroom for the manager's use.

6. The membership of the club consisted mostly of business and professional men and included most of the important corporation executives and businessmen of Kalamazoo. Certain manufacturing interests paid the dues for their officials and salesmen.

The noonday luncheon on weekdays was the principal meal served. Breakfast was never served. Meals in the evenings and on holidays and Sundays were served upon advance reservations. Such use of the club was substantial but much less than its use for lunch. The dinners served were about 10 percent of the total meals. The club set aside every Tuesday as men's night, when the members were encouraged to come to the club for dinner. The number attending varied from about two dozen to less than a dozen at the end of the period in question. Members and their wives attended dinner at the club when dinner was not served at their homes and on other occasions. Good foods at reasonable prices were served. Luncheons were served from 75 cents to 85 cents, and in the last half of the period involved a special 40-cent luncheon was also served. Other meals were $1.50. Members were frequently accompanied by out-of-town guests.

Card playing, bridge and cribbage, were engaged in by a substantial number of the members at the luncheon period. An average of about 80 persons per week out of a membership at the time of 140 played cards at the club during the year 1932.

7. Wives of members and their guests had the use of the middle dining room on the first floor when accompanied by a member; and there was set aside for the sole use of wives of members and their guests a ladies' dining room and dressing room. These facilities were used for luncheons, dinners, musicals, bridge parties, and the like. During the first twelve months of the period in question 48 such functions of sufficient importance to appear in the society columns of the local papers were held at the club, 19 the following 12 months, 22 the next, and 7 in the last 9 months.

8. For the twelve-months period ending June 30, 1932, which is typical of the 45 months covered by this suit, the

approximate number and purpose of the individual visits to the club by the members, exclusive of their guests, were as follows:

Noon day luncheons	11,975
Other meals	1,237
Visits without eating	300
New Year's Eve party	17

9. The following represents a typical twelve-month statement of income and expense during the period of this suit:

Income:	
Club dues and transfer fees	$28,101.88
Dining-room and cigar-stand sales	17,980.20
Employees' meals	5,708.06
Revenue from cards	1,811.25
Miscellaneous	26.95
Total income	53,628.34
Expense:	
Foodstuffs, cigars, cards, etc	15,491.32
Laundry, gas, china, printing, and miscellaneous supplies	3,315.64
Salaries and wages	10,477.85
Meals for employees	5,735.81
Manager's salary	2,563.66
Bookkeeper's salary	1,037.19
Taxes and insurance	2,665.04
Repairs to building and equipment	1,127.24
Heat, light, and water	1,765.02
Entertainment	111.65
Subscriptions, periodicals, flowers, decorations, stationery, office supplies, telephone, telegraph, postage, legal and professional expense	702.32
Interest paid	5,903.25
Bad debts	821.75
Depreciation	2,908.81
Miscellaneous	35.54
Total expense	54,662.08
Net loss	1,033.74

10. Plaintiff had no library. It had no pool or billiard tables, no bowling alleys, and no gymnasium equipment of any kind. There was no entertainment committee. The club sponsored no picnics, no tournaments of any kind, no lectures, no movies, no musicals, etc.

11. The purpose of the club was to promote social intercourse among its members, and among the wives of members. The men availed themselves of its facilities principally at the lunch hour, some for purposes of their own businesses or professions, others for social intercourse and relaxation. Wives of members utilized it solely for social purposes. Its social features and activities were not incidental but were a material part of its operation. During the period in question it was a social club.

The court decided that the plaintiff was not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

The plaintiff insists that it was nothing more than a luncheon club and so was exempt from taxation under section 501 of the Revenue Act of 1926 (44 Stat. 9, 92), as amended by section 413 of the Revenue Act of 1928 (45 Stat. 791, 864; 26 U. S. C. A., Sect. 950, 952; I. R. C., Sect. 710).

This section imposes a tax on the initiation fees and dues paid to "any social, athletic, or sporting club." The plaintiff insists that it was only a luncheon club in which social features were merely incidental and for this reason it insists that it is not subject to the tax.

We do not think the social activities of the Park Club were merely incidental, but were a substantial and necessary part of its life. The Club was run not only for the benefit of the members, but also for the pleasure of wives of members as well to a substantial extent. Wives of members and their guests had the use of the middle dining room on the first floor when accompanied by a member, and the ladies' dining room and dressing room were set aside for the sole use of wives of members and their guests. These facilities were used for luncheons, dinners, musicals, bridge parties, and the like. While the record does not disclose completely the extent of such use, it appears that during the first twelve months of the period in question at least forty-eight such parties were held or given which were of sufficient importance socially to appear in the society columns of the local papers. As the business depression set in the number diminished but it is evident that

these functions, which were purely social in their nature, were a material part of the activities of the club.

Men and their wives frequently had dinner at the Club, and one night each week a portion of the Club was set apart for the use of the men only and they were encouraged to attend for dinner on that evening. In comparison with the number attending for luncheon, the number eating dinner was few, about one out of ten; but such is the history of all downtown clubs.

Nor can it be said that the luncheons attended by the men did not have their social aspect. Many ate luncheon there for the companionship of congenial spirits, for relaxation in the middle of the day, for entertainment, at cards or in the reading room.

The facilities for these things were provided by the club not to induce its members to attend its luncheons, but because such activities were an essential part of its life. See *Fleming* v. *Reinecke*, 52 Fed. (2d) 449; *Chicago Engineers' Club* v. *United States*, 80 C. Cls., 615; *Transportation Club of San Francisco* v. *United States*, 84 C. Cls., 253; *Detroit Club* v. *United States*, 86 C. Cls., 549.

We are of opinion that it was a social club and so subject to the tax imposed by section 501 of the Revenue Act of 1926, as amended.

Plaintiff is not entitled to recover, and the petition is therefore dismissed. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

LEROY T. TAYLOR v. THE UNITED STATES

[No. 43747. Decided November 6, 1939]

On the Proofs

Rental and subsistence allowance; dependent mother; officer in U. S. Navy.—Where it is established that the mother of an officer in the U. S. Navy is dependent upon him for support, the fact that she owned a small amount of property does not preclude recovery for increased rental and subsistence allowances under the Act of June 10, 1922, as amended.

The Reporter's statement of the case:

Mr. Samuel T. Ansell for the plaintiff. *Mr. Mahlon C. Masterson* and *Ansell, Ansell & Marshall* were on the brief.

Miss Stella Akin, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. LeRoy T. Taylor, plaintiff, was appointed midshipman on June 16, 1931. He was graduated from the Naval Academy on June 6, 1935; and was commissioned ensign from said last date. He held the rank of ensign until June 6, 1938, when he was promoted to the rank of lieutenant, junior grade, effective as of that date.

2. Plaintiff's father, Charles H. Taylor, died in October 1923, at which time plaintiff was ten years old. At the time of his death, plaintiff's father owned real estate consisting of a lot and a very old house at Holly Springs, Mississippi, valued at that time at approximately $5,000, and had a life insurance policy and cash amounting to approximately $2,500, all of which was left by will to plaintiff's mother.

3. Plaintiff's mother, Beatrice Sims Taylor, was born in July 1870. She did not remarry after the death of plaintiff's father. Plaintiff had one brother, who died in 1927 at the age of thirteen.

4. Plaintiff's mother purchased five acres of unimproved and undeveloped land in Florida, during the boom, for $1,200, which is of little value at the present time. The assessed value is only $40. The land at no time produced any income. The balance of the cash from the father's estate was used in payment of debts left by him, maintaining the house, and for living expenses of the family prior to June 6, 1935.

5. Plaintiff's mother continued to live in the house at Holly Springs until November 1, 1935, when she went to California to live with plaintiff, and remained there with him for nearly one year. She then returned to Holly Springs, where she has since been living. After November 1, 1935, she leased the house and lot in Holly Springs until on or about March 11, 1936, during which period she received a rental of $15 per month. The house and lot were

deeded to plaintiff in March 1936, at which time there was an encumbrance of $600 on the property, which had been mortgaged for that amount in 1929 or 1930. In consideration of the property being deeded to plaintiff, he assumed all of the indebtedness against it at that time, consisting of the mortgage, arrears in taxes, etc. Plaintiff's mother had been unable to keep up the payment of the taxes as they became due. The house is frame, very old, and the amount expended for repairs and for taxes ranged from $8 to $12 a month.

6. Plaintiff's mother had no income during the period of the claim other than the contributions given her by plaintiff, except that for the period from November 1, 1935, to March 11, 1936, she received rental from her house at the rate of $15 per month, all of which, however, was expended in the payment of taxes and repairs. Plaintiff was the sole support of his mother during the entire period of his claim and contributed regularly from $45 to $50 a month, paid to her about the first of each month. Since the latter part of 1936, $40 was paid to her each month by allotment from his pay. Additional amounts were paid by plaintiff to his mother towards her support at irregular intervals.

7. Plaintiff has never been paid increased rental and subsistence allowances on account of a dependent.

8. Neither the plaintiff nor his mother at any time during the period of his claim occupied public quarters.

9. Rental and subsistence allowances due an officer of plaintiff's rank because of a dependent mother, for the period from June 6, 1935, to November 10, 1937, inclusive, total $1,138.67. Plaintiff's claim is for the period from June 6, 1935, to July 30, 1938, on which latter date he was married.

The court decided that the plaintiff was entitled to recover.

Whaley, *Chief Justice*, delivered the opinion of the court:

This action is brought to recover increased rental and subsistence allowances on account of a dependent mother under Sections 4, 5, and 6 of the Act of June 10, 1922, 42

Stat. 625, 627, as amended by the Act of May 31, 1924, 43 Stat. 250. Section 4 is the particular one herein involved and reads as follows:

> That the term "dependent" as used in the succeeding sections of this Act shall include at all times and in all places a lawful wife and unmarried children under twenty-one years of age. It shall also include the mother of the officer provided she is in fact dependent upon him for her chief support.

The facts in this case conclusively show that plaintiff's mother was dependent upon him for her chief support and the mere fact that she owned a small amount of property does not preclude recovery. *Tomlinson* v. *United States*, 66 C. Cls. 697, and *Tammany* v. *United States*, 69 C. Cls. 687.

The plaintiff is entitled to recover for the period from June 6, 1935, to July 30, 1938. Entry of judgment will be suspended to await the coming in of a report from the General Accounting Office showing the amount due plaintiff in accordance with this opinion. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* and GREEN, *Judge*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

Upon the report from the General Accounting Office, filed December 22, 1939, judgment for $1,544.40 was entered January 8, 1940.

LOUISVILLE BRIDGE COMMISSION v. THE UNITED STATES

[No. 43749. Decided November 6, 1939]

On the Proofs

Transportation of troops and munitions over toll bridge.—Where troops and munitions of war of the United States were transported over a toll bridge, it is held that the language contained in Section 2 of the General Bridge Act, approved March 23,

Reporter's Statement of the Case

1906, that "no higher charge shall be made * * * than the rate per mile paid for the transportation over any * * * public highway leading to said bridge" has reference only to situations where there was a toll road leading to the bridge.

Same.—Decisions of the United States Circuit Court of Appeals for the 5th and 9th circuits in *U. S.* v. *Columbia River-Longview Bridge Co.* and *Gouax* v. *Bovay* are concurred in.

The Reporter's statement of the case:

Mr. Harry J. Gerrity for the plaintiff.

Mr. J. Frank Staley, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows, upon the stipulation of the parties:

1. The plaintiff is, and was at all times herein mentioned, an agency and instrumentality of the City of Louisville, created pursuant to Chapter 74 of the Acts of 1928 of the General Assembly of Kentucky for the purpose of constructing, maintaining, and operating the Louisville Municipal Bridge, extending across the Ohio River from Second and Main Streets in Louisville, Kentucky, to Jeffersonville, in the State of Indiana.

2. No action has been had on the claim sued upon in this case, either in Congress or before any department of the Government, except as stated herein, and plaintiff is the sole owner of the claim sued upon and has never made any assignment or transfer thereof or of any interest therein.

3. The Louisville Municipal Bridge was built pursuant to an Act of Congress, approved February 25, 1928 (45 Stat. 146), and was completed and opened to traffic on November 1, 1929; and, prior thereto, on May 1, 1928, plaintiff issued and sold $5,500,000.00 City of Louisville Bridge Revenue Bonds and with the proceeds thereof constructed the aforesaid bridge, which has never been and under the Act of Congress, aforesaid, may not be operated for profit or private gain.

4. On May 31, 1937, and again on June 5, 1937, certain troops and munitions of war of the United States were furnished passage or transportation over the Louisville Munic-

ipal Bridge, for which the lawfully established tolls were charged by the plaintiff, as follows:

May 31, 1937:
1st Battalion, 68th Field Artillery en route from Fort Knox, Kentucky, to Morgantown, Indiana:

12 passenger cars @ 25¢	$3.00	
8 trucks @ 40¢	3.20	
44 trucks @ 50¢	22.00	
		$28.20

June 5, 1937:
1st Battalion, 68th Field Artillery moving from Largo, Indiana, to Fort Knox, Kentucky:

11 passenger cars @ 25¢	$2.75	
8 trucks @ 40¢	3.20	
45 trucks @ 50¢	22.50	
		$28.45
Total		$56.65

5. The plaintiff's tolls in general are based upon vehicles, and nothing additional is charged for extra passengers unless the vehicle carries or has a seating capacity of seven (7) persons including the driver, but pedestrians or troops on foot are or would be charged five cents (5¢) each. Receipts or certificates were given to plaintiff showing the service furnished for which toll was due, as above, and upon presentation by plaintiff of its claim for payment, the Quartermaster at Fort Knox, Kentucky, under date of June 14, 1937, wrote as follows:

Louisville Bridge Commission,
316 Illinois Avenue,
Jeffersonville, Indiana.
Gentlemen:

There is returned herewith your invoice dated June 11th in the amount of $56.65 in connection with toll services for passage of Government vehicles and troops of the First Battalion, 68th Field Artillery, Fort Knox, Kentucky, on May 31st and June 5, 1937, over the Louisville Municipal Bridge. In view of the provisions of the decision of the Acting Comptroller General of the United States, Volume 16, October 1936, containing decision No. A-75335, to the effect that the United States is not required to pay tolls for the movements of its mails, troops and munitions of war over bridges constructed pursuant to the General Bridge Act of March

23, 1906, or Acts of like import, you are advised that no further action will be taken to effect settlement of this account.

If there are any further questions relative to this claim it is suggested that you communicate with the General Accounting Office, Washington, D. C.

Very truly yours,

(Signed) E. G. THOMAS,
Major, Q. M. C.,
Quartermaster.

6. On June 9, 1937, the Comptroller General of the United States rendered a decision (16 Comp. Gen. 1061), covering payment of tolls by the War Department for passage over the Louisville Municipal Bridge of the troops and munitions of war of the United States, and held therein that since the bridge is served by free public highways, and was constructed subject to the provisions of the General Bridge Act of 1906, the United States was not liable for the payment of the tolls. There is no railroad or street railway leading to plaintiff's bridge and no tolls are charged for the use of the highway or highways leading to the bridge.

The court decided that the plaintiff was entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

This case presents the question of whether the United States is required to pay tolls for the movement of the mails, troops, and munitions of war over bridges constructed under the authority of Congress pursuant to the General Bridge Act of March 23, 1906, 34 Stat. 84, when the highways leading thereto are free.

The particular bridge involved crosses the Ohio River between Louisville, Kentucky, and an opposite point on the Indiana shore. It was authorized by the Act of Congress approved February 25, 1928, to be constructed in accordance with the provisions of the General Bridge Act approved March 23, 1906, and subject to the conditions and limitations contained therein. Section 2 of that act provides:

SEC. 2. That any bridge built in accordance with the provisions of this Act shall be a lawful structure and shall be recognized and known as a post route, upon which no higher charge shall be made for the transmis-

sion over the same of the mails, the troops, and the munitions of war of the United States than the rate per mile paid for the transportation over any railroad, street railway, or public highway leading to said bridge; and the United States shall have the right to construct, maintain, and repair, without any charge therefor, telegraph and telephone lines across and upon said bridge and its approaches; * * *.

There is no railroad or street railway leading to or across the bridge referred to above, and the highway or highways leading thereto are free and no toll is charged for the use of any of them.

The bridge in suit was completed and opened to traffic on November 1, 1929, and is a toll bridge. On May 31, 1937, and again on June 5, 1937, the defendant used the highways leading to the bridge for the passage of certain troops and munitions of war and crossed it with the same. Plaintiff brings this suit to recover from the Government for the transit of troops and military equipment over the Louisville bridge the regular tolls exacted from private owners under similar circumstances. The defendant insists that by the provisions of section 2 of the General Bridge Act of 1906, above quoted, the troops and munitions of war were entitled to free transit, or use of the bridge, as the bridge was served by free public highways.

The question here presented has been decided adversely to the defendant upon identical facts by the United States Circuit Courts of Appeal for the fifth and ninth circuits in well-reasoned opinions. See *United States* v. *Columbia River-Longview Bridge Co.*, 99 Fed. (2d) 287; and *Gouax* v. *Bovay*, 105 Fed. (2d) 256. Somewhat different reasons are given for the respective decisions in the two cases but there is no inconsistency. Both decisions hold in effect that section 2, quoted above, is ambiguous and that in construing it the prior administrative interpretation of the act in question as well as prior statutes should be considered. The final conclusion in effect was that the language contained in section 2 that "no higher charge shall be made * * * than the rate per mile paid for the transportation over any * * * public highway leading to said bridge," had reference only to situations where there was a toll road leading to the

bridge, and to this extent we concur. We think it unnecessary to discuss the language of these opinions in support of the conclusion reached.

While the Comptroller General has refused to accept these decisions as authority, the Solicitor General has not asked for certiorari in the *Columbia River-Longview Bridge case, supra*. Under the construction placed on the statute in these two cases, plaintiff is entitled to recover the regular and established tolls for the use of the bridge made by the Government. These tolls amount to $56.65, for which judgment will be rendered accordingly

WILLIAMS, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

THOMAS COMMINGS v. THE UNITED STATES

[No. 43773. Decided November 6, 1939]

On the Proofs

Pay and allowances, right to retire after thirty years service.—Where enlisted man in the United States Army was promoted to regimental sergeant major, and made application for retirement under the provisions of the Act of March 2, 1907, having served thirty years, but the application for retirement was disapproved by the Adjutant General, it is held that the disapproval was a nullity, and that applicant, having served thirty years, was entitled to retire with the retired pay and allowances of a regimental sergeant major.

Same.—No policy of the Military Establishment or opinion of the Adjutant General as to the propriety of an enlisted man being retired in any particular grade can affect the right granted by Congress.

The Reporter's statement of the case:

Mr. Mahlon C. Masterson for the plaintiff. *Ansell, Ansell & Marshall* were on the briefs.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff enlisted in the United States Army on May 4, 1893, and served continuously in various grades until February 15, 1916.

2. On December 15, 1915, plaintiff was promoted to the grade of regimental sergeant major to fill an existing vacancy. Plaintiff had completed thirty years' service.

3. On December 15, 1915, plaintiff made an application in writing for retirement as sergeant major pursuant to the act of March 2, 1907, 34 Stat. 1217, which provides, in part,

> That when an enlisted man shall have served thirty years either in the Army, Navy, or Marine Corps, or in all, he shall, upon making application to the President, be placed upon the retired list, with seventy-five per centum of the pay and allowances he may then be in receipt of, and that said allowances shall be as follows: * * *

4. Plaintiff's application for retirement, after having been approved by his commanding officer, was forwarded to The Adjutant General in Washington on December 16, 1915.

5. On January 12, 1916, The Adjutant General advised plaintiff's commanding officer as follows:

> It appears that Color Sergeant Thomas Commings was promoted to the grade of regimental sergeant major solely with a view to his retirement with increased rank and pay, without regard to his qualifications for the position, which is contrary to the policy of the War Department. * * * retirement of this man as regimental sergeant major will not be favorably considered.

6. On January 17, 1916, plaintiff's commanding officer advised The Adjutant General:

> 1. Returned.
>
> 2. Regimental Sergeant Major Thomas Commings has served honestly and faithfully in the 12th Infantry during his entire service (May 4, 1893, to present time). His service has been continuous.
>
> 3. He was appointed a Corporal about September 1899, and a Sergeant February 5, 1901, and Color Sergeant June 24, 1912. He has acted as a First Sergeant. He has never been tried or in arrest. He has sufficient education and would be capable to perform the duties

of a regimental sergeant major with a little oversight at first.

4. It has been the custom in the Army to reward meritorious service in a regiment on retirement, and I know of no more meritorious or exceptional case.

W. A. SAGE,
Colonel, 12th Infantry,
Commanding.

7. On January 26, 1916, the Adjutant General advised plaintiff's commanding officer that—

> Retirement of this soldier as regimental sergeant major is disapproved.

8. On February 1, 1916, plaintiff, was, without his consent, ordered to the grade of color sergeant. An application for retirement as color sergeant was signed by plaintiff and the application was approved and forwarded to the Adjutant General on the same day.

9. Plaintiff's application for retirement as color sergeant was approved by the Adjutant General on February 9, 1916, and Special Orders No. 33 of the same date were issued directing his retirement. Plaintiff had a total credit of 30 years, 1 month, and 23 days of active service, including allowance for double time for service in Cuba and the Philippine Islands.

On February 15, 1916, plaintiff was retired in the grade of color sergeant at Nogales, Arizona.

10. Plaintiff received the active duty pay and allowance of regimental sergeant major from December 15, 1915, to January 31, 1916, and as color sergeant from February 1, 1916, to February 15, 1916.

Plaintiff never performed the duties of regimental sergeant major but continued to act as supply sergeant and provost until he was retired. He has received the retired pay and allowance of a color sergeant since February 15, 1916.

11. The difference between the retired pay and allowances of a regimental sergeant major and the retired pay and allowances of a color sergeant which plaintiff received from November 1, 1931, to November 30, 1937, is $3,571.29. This is a continuing claim.

The court decided that the plaintiff was entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the court:

On December 15, 1915, plaintiff had served thirty years in the Army and on that day he was promoted to regimental sergeant major. After he had been promoted and was serving in this grade he made an application for retirement. Under the Act of March 2, 1907, 34 Stat. 1217, an enlisted man who has served thirty years, upon making application to the President is given the right to retire in the grade in which he is then serving and to receive seventy-five per centum of the pay and allowances he is then receiving. In the *Blackett case*, 81 C. Cls. 884, it is held that Congress gave a right which is unconditional and cannot be affected by any act of a superior officer or even the Commander-in-Chief of the Army.

Subsequent to the filing of plaintiff's application for retirement to the President, the Adjutant General disapproved his application for the reason that plaintiff had been promoted solely for the purpose of receiving advanced retirement pay. The record shows that plaintiff had a meritorious service in the Army and was capable of performing the duties of the grade to which he had been promoted and in which he was serving at the time the application was made. No policy of the military establishment or opinion of the Adjutant General as to the propriety of an enlisted man being retired in any particular grade can affect the right granted by Congress. Action by the department, after the thirty years have been served and application made by the enlisted man, in reduction of rank or any other change of status, is unwarranted and a nullity.

Plaintiff is entitled to recover the difference between the retired pay and allowances of a regimental sergeant major and the retired pay and allowances of a color sergeant.

The statute of limitations, 1069 Revised Statutes, sec. 156, judicial code, permits recovery only to six years prior to the commencement of suit. Recovery back of that date is barred. Plaintiff is therefore entitled to recover the retired

pay and allowances of a regimental sergeant major from November 1, 1931. The claim is a continuing one.

Entry of judgment will be suspended to await the coming in of a report from the General Accounting Office showing the amount due plaintiff in accordance with this opinion. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* and GREEN, *Judge,* concur.

WHITAKER, *Judge,* took no part in the decision of this case.

JAMES DENE v. THE UNITED STATES

[No. 43824. Decided November 6, 1939]

On the Proofs

Pay and allowances; retirement of enlisted man after thirty years' service.—Where enlisted man in the United States Army, having served thirty years, made application for retirement at the rank of a first sergeant, which he had then attained, and his application was approved by the Adjutant General, but subsequently and before notice of such approval had been received by his command, he was demoted from first sergeant to sergeant, it is held that such reduction in rank was of no effect, and that plaintiff was entitled to the retired pay of a first sergeant.

Same; right to retire absolute.—The retirement of a soldier after thirty years of service is not within the discretion of his Commanding Officer nor does such officer have the authority to fix the grade or rank at which a soldier may retire, or to affix any other condition to such retirement.

Same.—The mere fact that a soldier, eligible to retirement, being on foreign service, was not immediately notified of his retirement and certain military actions were taken before the retirement order was received, cannot affect or abridge the right given by Congress.

The Reporter's statement of the case:

Mr. Mahlon C. Masterson for the plaintiff. *Ansell, Ansell & Marshall* were on the briefs.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff enlisted in the United States Army on April 27, 1891, and served continuously in various grades until February 9, 1915.

2. On October 9, 1914, while serving in the grade of first sergeant at Tientsin, China, and receiving the pay and allowances of a first sergeant, plaintiff made application in writing to be retired in that grade. He claimed that he had to his credit a total service, in the Army and the Marine Corps of 29 years, 11 months, and 4 days, including double time for foreign service. His application was approved by his commanding general and forwarded through proper military channels to the Adjutant General with the statement that his service had been "checked as near as practicable and is believed to be correct."

3. By letter of December 1, 1914, the Adjutant General advised the commanding officer, China Expedition, Tientsin, China, through the commanding general, Philippine Department, that plaintiff's application for retirement as first sergeant had been approved and the records of the War Department showed that plaintiff had served 23 years, 1 month, and 13 days, and had a credit of 6 years, 11 months, and 17 days of double time, making a total credit of 30 years and 1 month as of December 1, 1914. On the same date, by order of the Secretary of War, plaintiff was placed on the retired list as first sergeant.

4. On December 1, 1914, when the Adjutant General approved plaintiff's application for retirement in the grade of first sergeant, plaintiff was not eligible to retire because he had been absent without leave for 33 days in 1901 while serving in the Marine Corps. He became eligible for retirement, according to the corrected computation of his service by the War Department, on December 6, 1914.

No additional application for retirement was filed after he became eligible for retirement.

5. Prior to the receipt by plaintiff's organization of Special Orders No. 283, dated December 1, 1914, placing plaintiff on the retired list as of that date, plaintiff on January 13, 1915, was reduced from the grade of first sergeant to the grade of sergeant by his commanding officer for the

alleged offenses of wilfully disobeying orders and being absent without leave on January 11 and 12, 1915.

6. Thereafter plaintiff was arraigned, tried, and found guilty by general court martial for disobedience to orders and absence without leave in violation of the twenty-first and thirty-second articles of war, respectively, and was sentenced to be reduced to the grade of private and to forfeit one-half of his monthly pay for one year.

7. The commanding officer of the Philippine Department, in reviewing the findings and sentence of the court martial, February 9, 1915, decided:

> In the foregoing case of Sergeant *James Dene*, Company D, 15th Infantry, the findings and sentence are not in accord, as the sentence is inadequate for a violation of the 21st Article of War.
>
> A careful study of the evidence, however, shows there was not a wilful disobedience of an order, and the findings on the first charge and specification are therefore disapproved.
>
> The reduction of First Sergeant *Dene* to Sergeant, as the result of the offenses for which he was tried, and after his unusually long and faithful service, is considered sufficient punishment for the offenses of which he was guilty. The sentence is therefore remitted. Sergeant *Dene* will be released from arrest and restored to duty.

Plaintiff had been reduced to the grade of sergeant by Company Order No. 1, January 13, 1915.

8. On February 10, 1915, plaintiff's commanding officer notified The Adjutant General that plaintiff was retired in the grade of sergeant on February 9, 1915. This notice was received by The Adjutant General on April 2, 1915. By paragraph 23 of Special Orders No. 79 of April 5, 1915, paragraph 5 of Special Orders No. 283 of December 1, 1914, was amended so as to show that plaintiff was placed on the retired list in the grade of sergeant instead of first sergeant.

Plaintiff has received the retired pay of a sergeant from February 9, 1914, to the present time.

9. The difference between the retired pay and allowances of a first sergeant and those of a retired sergeant, which plaintiff received from January 1, 1932, to January 1, 1938, is $1,984.64. This is a continuing claim.

The court decided that the plaintiff was entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the court:

This action is brought for the purpose of recovering the difference between the retired pay of a first sergeant and the retired pay of a sergeant in the Army.

Under the act of March 2, 1907, 34 Stat. 1217, the plaintiff had the absolute right when he had served thirty years, upon making application to the President, to be "placed on the retired list, with seventy-five per centum of the pay and allowances he may then be in receipt of." It has been frequently and repeatedly held by this court that this right of retirement is not subject to any discretion on the part of any superior officer, not even the Commander-in-Chief. As was said in the *Blackett case*, 81 C. Cls. 884, 891, "the right granted by Congress was without condition and absolute."

Plaintiff filed a proper application for retirement on October 9, 1914, when he was holding the rank of first sergeant. He had on that date served 29 years, 11 months, and 4 days.

The application was approved by the The Adjutant General on December 1, 1914, it being stated in the order of approval that the records of the department showed plaintiff had a total of 30 years and one month to his credit as of December 1, 1914. The facts show, however, that plaintiff became eligible for retirement on December 6, 1914.

Having completed thirty years' service on December 6, 1914, the right of retirement became vested in plaintiff and he was entitled to be retired as of that date. At that time he was holding the rank of first sergeant and, under the terms of the statute was, therefore, entitled to the retired pay of that grade.

The fact that other events took place after plaintiff's right of retirement had become absolute cannot affect that vested right. The Commanding Officer of the department, in reviewing the findings and sentence of a court martial in January 1915, held that "the findings and sentence are not in accord"; and he disapproved the findings and limited the sentence to demotion from first sergeant to sergeant, which

he held "after his unusually long and faithful service is considered sufficient punishment for the offenses of which he was guilty." But the plaintiff had already been retired as first sergeant and while a retired soldier in certain cases is still subject to court martial, the reduction in rank was not in this case within the power of the court martial or of the commanding general. Nor was the order of his commanding officer, on February 9, 1915, retiring plaintiff as sergeant of any effect, since the retirement of a soldier after thirty years of service is not within the discretion of his Commanding Officer, nor does such officer have the authority to fix the grade or rank at which a soldier may retire, or to affix any other condition to such retirement. Under the express terms of the statute he retires in the grade in which he is serving at the time the application is made and the right has vested. The mere fact that the plaintiff, being on foreign service, was not immediately notified of his retirement and certain military actions were taken before the retirement order was received by his Commanding Officer in China, cannot affect or abridge the right given by Congress and which was effective during this period.

The plaintiff is entitled to recover for the difference between the retired pay and allowances he would have received as a first sergeant and the pay and allowances received by him as a sergeant on the retired list for the period not barred by the statute of limitations, Judicial Code, Sec. 156, namely, from January 1, 1932. The claim is a continuing one.

Entry of judgment will be suspended to await the coming in of a report from the General Accounting Office showing the amount due in accordance with this opinion. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* and GREEN, *Judge,* concur.

WHITAKER, *Judge,* took no part in the decision of this case.

WHITNEY KERNOCHAN, EXECUTOR OF THE WILL OF FREDERIC KERNOCHAN *v.* THE UNITED STATES

[No. 44023. Decided November 6, 1939]

On the Proofs

Estate tax; contributions to Retirement Fund not insurance.—Where decedent was a member of the New York City Employees' Retirement System, and upon his death decedent's widow, named as beneficiary, in accordance with the provisions of the statute establishing the Retirement System and in accordance with the provision of decedent's application for membership, received from the Retirement Fund the amount which had been deducted from decedent's salary, plus interest, and the equivalent of one year's salary, it is held that the amount equivalent to one year's salary was properly exempt from the Federal estate tax as insurance but that the amount representing deductions from salary, plus interest, was not insurance and was therefore taxable under section 302 (c) of the Revenue Act of 1926, as amended.

Same; construction by State Courts.—In construing the Federal Acts levying estate taxes, the Federal Courts are not bound by the decisions of the State Courts, as to what constitutes insurance.

Same.—State law may control in construction of Federal taxing act only when such act, by express language or necessary implication, makes its own operation dependent upon State law.

The Reporter's statement of the case:

Mr. L. L. Hamby for the plaintiff.

Mrs. Elizabeth B. Davis, with whom was *Mr. Assistant Attorney General Samuel O. Clark*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

Plaintiff's testator, Frederic Kernochan, Chief Justice of the Court of Special Sessions of the City of New York, made application to become a member of the New York City Employees' Retirement System, a corporation, and was accepted. Pursuant to his application there was deducted from his salary certain amounts monthly which were paid to the Retirement System. He died before retirement, in which event, under the law of the State of

New York, and under the application for membership made by him, his widow Elizabeth H. Kernochan was entitled to a return of the amounts deducted from his salary, plus interest at 4 percent. This amount was paid to her.

The question presented is whether or not his nomination of her to receive these deductions, plus interest, upon his death, was a transfer intended to take effect in possession and enjoyment at or after his death, under Section 302 (c) of the Revenue Act of 1926 (44 Stat. 9, 70), as amended by Section 803 (a) of the Revenue Act of 1932 (47 Stat. 169, 279; I. R. C., Sec. 811, p. 121).

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Whitney Kernochan, plaintiff herein, is a citizen of the United States and a resident of the State of New York, and is the duly appointed, qualified, and acting executor of the will of Frederic Kernochan, who died January 9, 1937, a resident of the State of New York, and a citizen of the United States.

2. Plaintiff, as such executor, duly made and filed with the United States Collector of Internal Revenue for the Third District of New York, a Federal estate-tax return on Form 706, setting forth the gross estate, the deductions, and the net estate of the aforesaid decedent, and showing therein an estate-tax liability in the amount of $1,306.24.

In this estate-tax return under "Schedule D—Insurance," plaintiff reported the amount of $10,000 insurance, paid by the Travelers Insurance Company to Elizabeth H. Kernochan, the widow, as beneficiary. This return shows a gross estate of $96,762.78, which did not include any amount as insurance, and deductions of $25,107.65, leaving a net estate after exemptions of $31,327.98.

The tax shown due on the return, in the amount of $1,306.24, was duly assessed by the Commissioner on his September 1937 Miscellaneous Tax List.

3. On November 1, 1937, the Commissioner of Internal Revenue sent the plaintiff a letter in which he advised him of a proposed deficiency in estate tax in the amount of $2,027.36.

In said letter, the Commissioner tentatively determined the gross estate of the decedent to be $118,337.43, the amount of the deductions to be $65,557.46, the amount of the net estate to be $52,779.97, the amount of the tax tentatively determined to be $3,333.60, the amount shown on the return as the tax to be $1,306.24, and the deficiency proposed, in the amount of $2,027.36.

In arriving at the value of the gross estate in said letter of November 1, the Commissioner added to the gross estate which was returned by the executor, as other miscellaneous property not returned, the sum of $16,155.84 as principal and the sum of $5,118.81 as accrued interest, aggregating $21,274.65, representing alleged contributions by the decedent to the New York City Employees' Retirement System.

In said letter of November 1, the Commissioner noted that the amount paid to the decedent's widow by said System, $18,000, was includable as insurance, but since the total insurance (the said $18,000 plus a policy of $10,000 included in the return), $28,000, was subject to the insurance exemption of $40,000, there was no amount to be included in the gross estate on that account.

4. On November 23, 1937, the Commissioner of Internal Revenue sent the plaintiff a 90-day deficiency letter, in which he advised the plaintiff of the deficiency of $2,027.36, referred to in his said letter of November 1, 1937. Thereafter, the additional tax in the amount of $2,027.36 was assessed by the Commissioner of Internal Revenue on his February 1938 Miscellaneous Tax List. On February 11, 1938, plaintiff paid to the Collector of Internal Revenue for the Third District of New York, the sum of $3,333.60, being the amount of estate tax shown to be due on the return, plus the deficiency tax assessed by the Commissioner of Internal Revenue.

In the Commissioner's letter of November 23, 1937, he determined the value of the gross estate of the decedent to be $118,337.43, the deductions to be $65,557.46, the net estate to be $52,779.97, the tax as tentatively determined to be $3,333.60, the amount shown on the return as the tax to be $1,306.24 and the deficiency to be the sum of $2,027.36 all

as was set forth in his said letter of November 1; but instead of adding to the gross estate returned the sum of $21,274.65, representing other miscellaneous property owned by the decedent at the time of his death in the form of contributions by the decedent to the New York City Employees' System, with interest thereon, he omitted to include any such or other sum as additional miscellaneous property owned by the decedent, and determined that there was no amount to be added to the gross estate returned as such miscellaneous property. The Commissioner did, however, in said letter of November 23, 1937, add to the gross estate of the decedent returned by the executor, the sum of $21,274.65, which he determined to be the amount of a transfer made by the decedent to take effect at or after his death under Section 302 (c) of the Revenue Act of 1926 as amended, alleging that such transfer represented "contribution plus accrued interest to New York City Employees' Retirement System."

5. On March 15, 1938, plaintiff filed with the Collector of Internal Revenue for the Third District of New York, a claim for refund of $2,027.36, estate tax deficiency previously paid as aforesaid. Said claim was based on the ground that the Commissioner erred in including within the gross estate of the decedent the sum of $21,274.65, as a transfer made to take effect at or after his death within the meaning of Section 302 (c) of the Revenue Act of 1926, as amended.

On July 11, 1938, the Commissioner of Internal Revenue rejected the above-mentioned claim for refund.

6. The New York City Employees' Retirement System is a part of the Greater New York Charter, authorized by Chapter 427 of the Laws of 1920, enacted by the legislature of the State of New York, and such System has at all times had the powers and privileges of a corporation, ever since its creation in October 1920.

7. Plaintiff's decedent, Frederic Kernochan, died January 9, 1937, and at the time of his death was a member of said Retirement System, having become such a member on October 1, 1920, in Group 3 thereof, as Chief Justice of the Court of Special Sessions of the City of New York.

Reporter's Statement of the Case

The application by which plaintiff's decedent became a member of the said Retirement System, reads, in part, as follows:

> I hereby make application for membership in the New York City Employees' Retirement System to begin October 1, 1920, and to enjoy the privileges provided by Chapter XXVI of the Greater New York Charter, including the ordinary life insurance, the accidental death insurance, the ordinary disability insurance, the accidental disability insurance, and the old-age pension and annuity benefits provided. I desire that the deductions from the compensation of a member required by law for annuity purposes be made from my compensation and consent and agree thereto. I understand that should I leave the service at any time before becoming eligible for other benefit, all deductions from my salary, with 4% interest thereon, will be refunded on my demand.
>
> In order that I may enjoy the privileges provided by the law for members and their beneficiaries, I hereby waive and renounce all present and prospective benefits provided wholly or partly by or at the expense of the City of New York through any other retirement system or pension fund.
>
> I am not entitled to share in the Police Pension Fund, the Fire Department Relief Fund, the Department of Street Cleaning Relief and Pension Fund, the Teachers' Retirement System, or the Hunter College Retirement System.
>
> I submit herewith a true statement of service rendered by me prior to October 1, 1920, for which I claim credit under the provisions of Chapter XXVI of the Greater New York Charter. This statement includes only time paid for.
>
> * * * * *
>
> In accordance with Chapter XXVI of the Greater New York Charter, I, Frederic Kernochan, hereby nominate Elizabeth H. Kernochan whose address is 862 Park Ave., Man., and whose relationship to me is my wife, as the beneficiary to whom I request and hereby authorize the New York City Employees' Retirement System to pay in the event of my death prior to retirement on pension, the total amount of my accumulated deductions from my compensation standing to my credit in the New York City Employees' Retirement System; I fur-

Reporter's Statement of the Case

ther nominate Elizabeth H. Kernochan, whose address is 862 Park Ave., and whose relationship to me is my wife, as the beneficiary to whom I request and hereby authorize the New York City Employees' Retirement System to pay the cash death benefit allowable on my account in the event that my death should not be the result of an accident while in the performance of duty permitting the granting of a pension of one-half of my final compensation. I hereby direct that, should I survive either or both of the before-mentioned beneficiaries, the amount which otherwise would have been payable to the beneficiary or beneficiaries shall be paid to my estate or to such other beneficiary or beneficiaries as I shall hereafter nominate, by written designation filed with the New York City Employees' Retirement System in accordance with the rules and regulations prescribed by the Board of Estimate and Apportionment.

8. After becoming a member of the said Retirement System on October 1, 1920, there was deducted from his compensation as such member, and with his specific consent, a sum equal to 5.40 percent thereof, semimonthly. Effective October 1, 1929, the percentage of deductions from his compensation was increased to 7.40 percent of his earnable compensation, and such deductions continued until the death of said decedent. This change in the deductions was made by election of said decedent, for the purpose of effecting an increase in the annuity which would be payable to him subsequent to retirement as a City employee, and to increase the total amount which would be payable at his death. The aggregate amount which was thus deducted from the compensation of the decedent while a member of the said Retirement System in City service, to the date of his death, was $16,028.12.

9. After the death of plaintiff's decedent, the said Retirement System paid to the beneficiary named in the said application of decedent, the sum of $39,274.65, the same being paid to said beneficiary in the form of a check for that amount, which included all the benefits to which the beneficiary was entitled under the provisions of said Retirement System.

This amount of $39,274.65 represented an amount equivalent to the contributions by the decedent to the New York City Employees' Retirement System, together with interest thereon aggregating $21,274.65, plus an amount equal to the compensation earnable by the decedent during the year preceding his death in the amount of $18,000.

10. The value of the decedent's total retirement allowance as of January 9, 1937, was $98,183, in both the annuity savings fund and the pension fund. This retirement allowance is provided for by the System, and is built up through the periodic deductions from the member's compensation and contributions made by the City of New York.

If the decedent had been eligible to retire on January 1, 1937, and if he had retired on that date, he would have been entitled to a total retirement allowance of approximately $9,455 per annum payable throughout life, in which event, upon his death at any time thereafter, the beneficiary named in his application would not have been entitled to any payment from the retirement fund. The decedent, upon retirement, could, however, have elected to take a smaller annuity than $9,455, to wit, approximately $7,880, in which event, in case he died, the then present value thereof would be payable to his beneficiary, and this would have amounted to the difference between the retirement allowance of $98,183.00 and an aggregate amount of the annuities which had been paid from the date of his retirement to the date of his death.

Had plaintiff's decedent resigned from City service before his death, neither the beneficiary named in his application, nor any other person, upon his death, would have been entitled to receive anything from the Retirement System.

If plaintiff's decedent had not died on January 9, 1937, but had continued to be a member of the Retirement System and actively in City service, he would not have been entitled to withdraw any of the amounts which had theretofore been deducted from his compensation.

11. A separate account in respect of each member of the Retirement System is maintained, which shows the amount of deductions from each member's compensation, but with-

out distinction, the amounts deducted from the compensation of the various members were invested by the Retirement System, and no pro rata, or other part of any income realized, nor any loss sustained by the Retirement System from such investment, was credited to or charged against the account of any individual member, since the Retirement System, as a corporation, invests all such funds and receives income therefrom as though such funds were its own property, subject to the restrictions placed upon investments of the Retirement System by the laws of the State of New York.

The New York City Employees' Retirement System is under the supervision of the Department of Insurance of the State of New York and its investments are restricted to such as savings banks in that State are permitted to make.

12. The percentage of deductions from a member's compensation is determined by the Actuary of the System, and it is based upon the age at the time of becoming a member, and the retirement age which at that time is selected by the member. Plaintiff's decedent became a member at the age of 44 years and he selected age 60 as his retirement age.

At the time plaintiff's decedent became a member, the percentage of the deductions from his compensation had to be determined so as to produce ½ of the benefit of 1/70 of his salary, using the highest probable average of salary for a period of 5 years, multiplied by the number of his years of service.

Subsequently, plaintiff's decedent had the privilege of increasing his benefit to 1/60 of his salary, multiplied by the years of membership. In order to compute such benefit which was to produce ½ of the probable allowance, it was necessary to determine the percentage of his salary which, if contributed from the time he became a member at age 44, would build up, by the time he reached the retirement age of 60 years, a sum of money sufficient to produce an annuity of 1/120, that is ½ of 1/60, of his salary for the last five years of his service, presuming them to be the highest five years, multiplied by the number of years of service. That rate in the case of plaintiff's decedent was first computed at 5.4

percent at the time he became a member and was based on the benefit of 1/70 of his salary. Later, this rate was changed to 7.4 percent, which was computed to be sufficient to build up the desired sum at age 60, taking into account the previous deductions from his compensation.

13. In determining the member's rate of contribution, the Actuary of the System used methods similar to those which an ordinary insurance company would use in determining an annual premium for a deferred life annuity, except that he added one additional factor, that is, the rate at which the salary might be presumed to increase during the future membership of the member. Such deferred annuity policies written by ordinary life insurance companies also have similar provisions for death benefits as is provided in the New York City Employees' Retirement System.

Under group annuity contracts, insurance companies which issue policies providing for deferred annuities and death benefits use methods identical with the methods of the Retirement System. They convert the money from the savings account to an annuity, using similar mortality tables and interest rates, and they allow optional choices similar to those in the Retirement System. The purpose of the computation of the percentage of deductions from the member's salary is to build up ½ of a fund necessary to pay the annuities provided for in the System upon retirement, the City of New York to contribute the remainder. As a result of such contribution by the City the amount paid into the retirement fund by an employee is only approximately one-half of the rate which would be charged him by an insurance company if he took out a policy providing for an annuity of the same amount. The rate charged by an ordinary insurance company is higher because, in the case of the Retirement System, the annuities are computed on a net rate basis, as there is no allowance made for expenses, commissions, and taxes, such as ordinary insurance companies would have to take into account.

When a new employee enters the City service and becomes a member of the System, the City of New York contributes a rate to match the annuity that this member is to produce

through salary deductions at the retirement age he selects. The City also puts in another rate to pay disability pension, in case the member should be disabled from ordinary causes or exceptional causes, to take care of widows' annuity in the event of accidental death, and to take care of the ordinary death benefit. These rates of contributions by the City of New York are determined by actuarial tables so that the deductions from the member's compensation take place concurrently with the rate of contribution by the City.

The court decided that the plaintiff was not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court.

On October 1, 1920, the decedent was Chief Justice of the Court of Special Sessions of the City of New York. As such he was eligible to become a member of the New York City Employees' Retirement System. On this date he made application to become a member and was accepted.

Under the provisions of the law providing for the New York City Employees' Retirement System (Laws of New York, 1920 Edition, Vol. 2, Chap. 427, pp. 1056–1078), and under the provisions of the application made by the decedent in this case, he was entitled to retire at the age of 60 years; whereupon, he was entitled to receive annually a certain annuity, the total amount of which could not exceed $98,183. This was payable either at the rate of $9,455 per annum, in which event payments ceased at his death, or, at decedent's option, at the rate of $7,880 per annum. In the latter event and upon his death the difference between the total retirement allowance of $98,183 and the total amount of annuities withdrawn by him was payable to his nominee, or to his estate if no nominee were named.

If he chose, he could withdraw from the Retirement System prior to reaching the age of sixty, in which event he was not entitled to any annuity, but was entitled to have returned to him all amounts deducted from his salary, with 4 per cent interest thereon; or, if he died prior to retirement, his nominee or his estate, as the case might be,

was entitled to receive the total amount deducted from his salary, plus interest at 4 percent, and, in addition, an amount equal to a year's salary.

The decedent had not retired at the time of his death. The total amount deducted from his salary, plus interest at 4 per cent, amounted at the time of his death to $21,274.65. This amount, plus a year's salary, $18,000, or a total of $39,274.65, was paid to Elizabeth H. Kernochan, in pursuance of the direction contained in the decedent's application to become a member of the Retirement System.

The applicable portions of the application read as follows:

> * * * I, Frederic Kernochan, hereby nominate Elizabeth H. Kernochan * * * as the beneficiary to whom I request and hereby authorize the New York City Employees' Retirement System to pay, in the event of my death prior to retirement on pension, the total amount of my accumulated deductions from my compensation standing to my credit in the New York City Employees' Retirement System; I further nominate Elizabeth H. Kernochan * * * as the beneficiary to whom I request and hereby authorize the New York City Employees' Retirement System to pay the cash death benefit allowable on my account in the event that my death should not be the result of an accident while in the performance of duty permitting the granting of a pension of one-half of my final compensation.

The Commissioner determined that the $18,000 paid decedent's widow was insurance, and, since the total amount of insurance did not exceed $40,000, was exempt, but he included in the gross estate of decedent the sum of $21,274.65, representing the total deductions from his salary, plus 4-percent interest, as a transfer made by the decedent, to take effect at or after his death, under Section 302 (c) of the Revenue Act of 1926, as amended (I. R. C., Sect. 811).

The plaintiff insists that the widow did not receive this sum as the result of a transfer made to take effect at or after decedent's death, but, on the contrary, that it was insurance on the decedent's life.

With this contention we cannot agree.

The purpose of the deductions from decedent's salary and the contribution made by the City of New York was to build up a fund from which the employee could be paid an annuity upon his retirement. This is evidenced by the fact that when the System was released from the obligation to pay the annuity, either by applicant's withdrawal during life and before retirement, or by death before retirement, he, or his estate or nominee, was then entitled to have returned all amounts deducted from his salary, plus interest at 4 percent. Upon withdrawal or death the contract to pay the annuity was cancelled and the consideration returned. The exact amount paid, plus interest, was refunded, no more and no less. There is no element of insurance in this.

Had the widow upon the decedent's death been entitled to receive the annuity payable to the employee upon his retirement, there would be room for the contention that the contract was a contract of insurance, but she was not entitled to this, but only to a refund of the amount paid, plus interest.

The Retirement System was under liability to decedent to return to him or his estate or nominee the amount deducted from his salary upon his withdrawal or upon his death prior to retirement. This was an asset of decedent's estate at the time of his death. It passed to his widow by virtue of the direction contained in decedent's application. This amount the decedent would have been entitled to receive during his lifetime upon withdrawal prior to retirement. His widow was entitled to it only upon his death. It was therefore properly included in decedent's gross estate.

The widow was entitled to receive, in addition to a return of the deductions, decedent's salary for a year. This has been treated by the Commissioner as insurance and the correctness of this action is not disputed by either party.

Our attention has been directed to the case of *In the Matter of the Estate of Mary V. Fitzsimmons*, 158 N. Y. Misc., 789, in which it was held that the amount received under a similar statute from the Teachers' Retirement System was exempt from the New York Estate Tax as insurance. It

does not appear that any attempt was made in that case to differentiate between the amount refunded and the amount paid as a death benefit.

In *the Matter of the Estate of Hugh O'Donnell*, 153 N. Y., Misc., 480, it was assumed, but without discussion, that such amounts were in the nature of insurance.

Even though we were bound by the decisions of the state courts in construing the Federal Estate Tax Act, we would not feel bound by these decisions, because in them the point was not raised that is raised in this case.

But it is clear we are not so bound. *Lyeth* v. *Hoey*, 305 U. S. 188, 191–194; *Burnet* v. *Harmel*, 287 U. S. 103, 110. The Federal Estate Tax Act exempts from the estate tax insurance. What is insurance, as the word is used in the Act, is a question for the Federal courts, just as the questions of what is an inheritance or what constitutes a sale of capital assets, as those words are used in the Federal Income Tax Acts, were held to be questions for the Federal courts in the cases cited *supra*, in the determination of which they are not bound by the decisions of the state courts. As was said in both *Burnet* v. *Harmel* and *Lyeth* v. *Hoey*, *supra*,

> State law may control only when the federal taxing act, by express language or necessary implication, makes its own operation dependent upon state law.

For the reasons stated we hold that the payment to the widow of the $21,274.65 was a refund of amounts paid for an annuity contract, from the obligation of which the System had been discharged; that it was not insurance; that it was an asset of decedent's estate at the time of his death and that it was therefore properly included in decedent's gross estate.

Plaintiff is not entitled to recover and the petition is dismissed. It is so ordered.

WILLIAMS, *Judge;* and LITTLETON, *Judge*, concur.

GREEN, *Judge;* and WHALEY, *Chief Justice*, concur in the conclusion.

EMMETT F. DICKERSON v. THE UNITED STATES

[No. 44263. Decided November 6, 1939]

On the Proofs

Pay and allowances; reenlistment allowances; suspension of basic pay act provision not a repeal.—The Acts of Congress suspending the operations of Section 9 of the basic pay Act of June 10, 1922, for the fiscal years 1933–37, did not operate as a repeal of that Act and were not intended by Congress to do so; the basic act remained unchanged and without modification as it had always stood.

Same; intent of Congress.—Congress, in dealing with the question of reenlistment allowance, having for the fiscal years preceding 1938 specifically and in plain terms stated that the provision in the basic pay act was suspended during those years, it must be assumed that had Congress intended to continue such suspension it would have employed either the same language or language equally plain and unequivocal.

Same; permanent legislation.—The Act of June 10, 1922, is a part of the permanent pay legislation of the Army.

Same; limitation of appropriated funds.—The proviso in Section 402 of the Act of June 21, 1938, which limits the availability of funds appropriated for the fiscal year 1939, from which the reenlistment allowance could have been paid, constitutes a prohibition on the administrative officers of the Government against such use of any of the funds appropriated in said Act but does not affect the basic right of enlisted men to said reenlistment allowance, which is founded upon permanent legislation.

Same; failure to appropriate.—It is well established that recovery may be had where Congress has failed to appropriate all the amount provided as compensation for an officer under the basic law, and also where there was a failure to appropriate any money for pay provided for in earlier permanent legislation.

The Reporter's statement of the case:

Mr. Herman J. Galloway for the plaintiff. *Messrs. King & King* were on the brief.

Miss Stella Akin, with whom was *the Assistant Attorney General*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff served in the United States Army as a private or a noncommissioned officer during the following periods: August 16, 1917, to July 6, 1919; July 7, 1919, to July 6, 1920; July 7, 1920, to July 6, 1923; July 7, 1923, to July 8, 1926; July 14, 1926, to July 19, 1929; July 20, 1929, to July 21, 1932; July 22, 1932, to July 21, 1935, and July 22, 1935, to July 21, 1938. He was honorably discharged from each of the above enlistments. On July 22, 1938, plaintiff reenlisted to serve three years and is now serving under that reenlistment as a private, detached enlisted men's list, Headquarters Company, stationed at Washington, D. C.

2. When plaintiff last reenlisted on July 22, 1938, he was not paid a reenlistment allowance, although he had reenlisted within three months from the date upon which he had been honorably discharged from the preceding three-year term of enlistment.

3. If entitled to the reenlistment allowance for his reenlistment of July 22, 1938, there is due plaintiff the sum of $75.

The court decided that the plaintiff was entitled to recover.

WILLIAMS, *Judge*, delivered the opinion of the court:

Plaintiff is a private in the United States Army where he has served as an enlisted man for a period of more than 20 years. On July 21, 1938, he was honorably discharged from a three-year term of enlistment, and on July 22, 1938, reenlisted for a period of three years in the grade of private.

Section 9 of the basic pay act of June 10, 1922, 42 Stat. 625, 629; U. S. C. Title 10, Sec. 633, provides:

> On and after July 1, 1922, an enlistment allowance equal to $50, multiplied by the number of years served in the enlistment period from which he has last been discharged, shall be paid to every honorably discharged enlisted man of the first three grades who reenlists within a period of three months from the date of his discharge, and an enlistment allowance of $25, multi-

> plied by the number of years served in the enlistment period from which he has last been discharged, shall be paid to every honorably discharged enlisted man of the other grades who reenlists within a period of three months from the date of his discharge.

By virtue of this provision of law plaintiff upon his reenlistment on July 22, 1938, became entitled to receive as a reenlistment allowance the sum of $75. He has not been paid this reenlistment allowance and is entitled to recover that amount in this suit if this statute was in effect at the time of his reenlistment.

The act of August 4, 1854, section 2, 10 Stat. 575, provided a reenlistment allowance for enlisted men of the Army who reenlisted within one month after an honorable discharge from a previous enlistment. Subsequent acts of Congress, prior to the act of June 10, 1922, continued the payment of this reenlistment allowance in various forms. Following the passage of the act of June 10, 1922, all men reenlisting in the Army within three months from the date of their honorable discharge from preceding enlistments were paid reenlistment allowances provided in that act until after July 1, 1933, upon which date such payments were suspended under the provisions of section 18 of the act of March 3, 1933, Treasury-Post Office Department Appropriation Act, 47 Stat. 1489, 1519, which reads:

> Sec. 18. So much of sections 9 and 10 of the Act entitled "An Act to readjust the pay and allowances of the commissioned and enlisted personnel of the Army, Navy, Marine Corps, Coast Guard, Coast and Geodetic Survey, and Public Health Service," approved June 10, 1922 (U. S. C. Title 37, secs. 13 and 16), as provides for the payment of enlistment allowance to enlisted men for reenlistment within a period of three months from date of discharge is hereby suspended as to reenlistments made during the fiscal year ending June 30, 1934.

Section 24 of the Act of March 28, 1934, 48 Stat. 509, 523, continued in the same language the suspension for the fiscal year 1935.

The suspension was further continued in the same language for the fiscal year 1936 by the Act of May 14, 1935,

the Treasury-Post Office Department Appropriation Act, 49 Stat. 218, 226.

The suspension was last invoked for the fiscal year 1937 by the Treasury-Post Office Department Appropriation Act of June 23, 1936, 49 Stat. 1827, 1837, which employed the same language.

Manifestly these acts of Congress suspending the operations of section 9 of the basic pay act of June 10, 1922, for the fiscal years 1933–37, did not operate as a repeal of that Act and was not intended by Congress to do so. The basic act remained unchanged and without modification as it had always stood.

For the fiscal years 1938 and 1939, Congress did not continue the suspension of the provisions of the 1922 act in respect to the payment of the reenlistment allowance involved but made unavailable for the payment of such allowance all appropriations enacted for these years. For the fiscal year 1939 it was provided in section 402 of Public Resolution No. 122, approved June 21, 1938, 52 Stat. 809, 818, that:

> * * * no part of any appropriation contained in this or any other Act for the fiscal year ending June 30, 1939, shall be available for the payment of enlistment allowance to enlisted men for reenlistment within a period of three months from date of discharge as to reenlistments made during the fiscal year ending June 30, 1939, notwithstanding the applicable provisions of sections 9 and 10 of the Act entitled "An Act to readjust the pay and allowances of the commissioned and enlisted personnel of the Army, Navy, Marine Corps, Coast Guard, Coast and Geodetic Survey, and Public Health Service," approved June 10, 1922 (37 U. S. C. 13, 16).

Similar provision was made in the act of May 28, 1937, 50 Stat. 213, 232, in respect to the fiscal year 1938.

The defendant contends that it was the intention of Congress to suspend the operation of the permanent law for the payment of the enlistment allowances for the fiscal years ending June 30, 1938, and June 30, 1939, and says in the brief that "the later two Acts were so clear as to be *express legislation* against the payment of reenlistment allowances."

We cannot agree with the defendant in this contention. The language found in these provisos contains no reference to the suspension of the basic statute. Congress in dealing with this question for the fiscal years preceding 1938 had specifically and in plain terms stated that the provision in the basic pay act for an allowance for reenlistment during those years was suspended. It must be assumed that had Congress intended to continue such suspension for the fiscal years 1938 and 1939 it would have employed the same language, or language equally plain and unequivocal. The deliberate selection of language so different from that used in the preceding Acts indicates that a change of law was intended and gives rise to a definite presumption that it was the intention of Congress to change from and not to continue the suspension which had previously existed for the preceding years. *United States* v. *Fisher*, 2 Cranch 358, 1 Dallas 421; *Pirie* v. *Chicago Title and Trust Co.*, 182 U. S. 438; *Crawford* v. *Burke*, 195 U. S. 176; *Brewster* v. *Gage*, 280 U. S. 327.

Following the enactment of the statute of June 10, 1922, Congress in the various appropriation acts for subsequent years made no appropriation in a designated amount for the payment of the reenlistment allowance. However, the funds appropriated for the "Pay, and so forth, of the Army" in respective appropriation acts were regarded as available for such payment and prior to June 30, 1933, payment had regularly been made out of such appropriations without question. The act of June 10, 1922, is a part of the permanent pay legislation of the Army. This Act, being neither suspended for the fiscal year 1939 nor modified in any way, was in full force and effect at the time of plaintiff's reenlistment. Plaintiff's legal right to the reenlistment allowance therefore accrued to him upon the date of his reenlistment. His failure to receive the allowance has arisen solely from the proviso which limits the availability of funds appropriated for that fiscal year from which the allowance could have been paid. While this restriction clearly constitutes a prohibition on the administrative officers of the Government to use any of the funds so appropriated, such limitation does not affect his basic

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right to the allowance which is founded upon permanent legislation.

In *Geddes* v. *United States*, 38 C. Cls. 428, the question arose as to the effect to be given to a limitation on an appropriation carried in the act of March 3, 1885, 23 Stat. 353, 356, which provided:

> That no part of the money herein or hereafter appropriated for the Department of Agriculture shall be paid to any person, as additional salary or compensation, receiving at the same time other compensation as an officer or employee of the Government.

The court, holding that plaintiff was entitled to recover, notwithstanding this limitation, said:

> The statutory provision is a proviso to an appropriation, and its plain purpose is that no person in the Department of Agriculture, or out of the Department of Agriculture, who is receiving "compensation as an officer or employee of the Government" shall be paid additional compensation for additional service out of general funds appropriated for the Department of Agriculture. Applying to no designated class of persons, it is a provision of law controlling appropriations for the Department by limiting the discretionary authority of the Secretary. The evil against which it is directed is the practice of allowing additional compensation for additional service in that Department.
>
> That limitation upon the power of the Secretary does not constitute a defense. An appropriation is the setting aside by Congress of a designated amount of public money for a designated purpose.
>
> "No money shall be drawn from the Treasury but in consequence of appropriations made by law." (Const. Art. 1, sec. 9.)
>
> The accounting officers are the guardians of the appropriations. It is their business to see that no money is paid out of the Treasury unless the payment is authorized by an appropriation act. It is not their business to adjudicate abstract questions of legal right beyond the legal right of a person to be paid out of a specific appropriation. An appropriation constitutes the means for discharging the legal debts of the Government.
>
> The judgment of a court has nothing to do with the means—with the remedy for satisfying a judgment. It is the business of courts to render judgments, leaving to

Congress and the executive officers the duty of satisfying them. Neither is a public officer's right to his legal salary dependent upon an appropriation to pay it. Whether it is to be paid out of one appropriation or out of another; whether Congress appropriate an insufficient amount, or a sufficient amount, or nothing at all, are questions which are vital for the accounting officers, but which do not enter into the consideration of a case in the courts. This has been repeatedly held by the Supreme Court and this court, beginning with *Graham's Case*, in the first volume of the Reports (1 C. Cls. R. 380). The appropriations made for all the Executive Departments, except that of the Department of Agriculture, are specific—so much for this object, so much for that. But it has been the legislative practice for some years to appropriate gross amounts for the Department of Agriculture, and at the same time to append the above limitation upon the power of the Secretary. The judgment of this court will not be paid out of that appropriation; the limitation upon the power of the Secretary does not extend to the court; the real question before the court is that of the claimant's legal right to receive the pay of both offices, irrespective of the statutes above quoted.

In *Erwin* v. *United States*, 37 Fed. 470 (S. D. Ga. 1889), a clerk of the court brought suit for his per diem allowance under Sec. 828, Revised Statutes, which provided that he should receive $5.00 a day for his attendance on the court while actually in session. The appropriation act of August 4, 1886, 24 Stat. 253, contained the following provision:

> Nor shall any part of the money appropriated by this act be used in the payment of a *per diem* compensation to any clerk or marshal for attendance in court except for days when business is actually transacted in court, and when they attend under sections 583, 584, 671, 672, and 2013 of the Revised Statutes.

The Court, holding that the limitation contained in the appropriation act was a limitation upon the appropriation only, and not a suspension, repeal or modification of the basic law, said (p. 478):

> Under the provisions of the fee-bill (section 828, Rev. St.,) the clerk was entitled to a *per diem* for his attendance on the court when actually in session even

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> though "no suitors appeared, or for other reason the court, in its discretion, adjourned to a future day." *Jones* v. *U. S.*, 21 Ct. Cl. 1; *Bill* v. *U. S.* (Ct. Cl. No. 15570). (23 Ct. Cl. 142.) *Goodrich* v. *U. S.*, 35 Fed. Rep. 193. The limitation in the act of August 4, 1886, was expressly confined to the money appropriated by that act, and did not therefore repeal the general statute giving the clerk the right to his *per diem* for his attendance for each day when the court is actually in session.

This provision in the appropriation act of August 4, 1886, was also construed by the Circuit Court of Appeals (First Circuit), *United States* v. *Aldrich*, 58 Fed. 688, 689, where the ruling in *Erwin* v. *United States*, *supra*, was reannounced.

It is well established that recovery may be had where Congress has failed to appropriate all the amount provided as compensation for an officer under the basic law, and also where there was a failure to appropriate any money for pay provided for in earlier permanent legislation. *United States* v. *Langston*, 118 U. S. 389; *Bell* v. *United States*, 35 Fed. 889; *United States* v. *Vulte*, 233 U. S. 509; *Archbald* v. *United States*, 218 Fed. 270; *Graham* v. *United States*, 1 C. Cls. 380; *Collins* v. *United States*, 15 C. Cls. 22; *Strong* v. *United States*, 60 C. Cls. 627; *Elmer E. Miller*, 86 C. Cls. 609, 613. While these cases are not directly in point on the question presented in this case the principle is the same.

Plaintiff is entitled to recover. The contention that the provision of the basic pay act of June 10, 1922, was suspended for the fiscal year 1939, insofar as it related to the pay of the reenlistment allowance, cannot be sustained. That Act had not been repealed or modified in any respect and was in full force and effect during the fiscal year. The restriction placed by Congress upon the use of appropriations made for the fiscal year for payment of such reenlistment allowances has been uniformly construed to affect only sums appropriated and otherwise available. Such limitation was binding on the administrative officers of the Government but in no way suspended or repealed the basic right of reenlisted men to the allowance.

Per Curiam

It is ordered that judgment against the United States in favor of the plaintiff be awarded in the sum of $75.00.

LITTLETON, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

DUFFY BROS., INC. v. THE UNITED STATES

[No. 44275. Decided November 6, 1939]

On Demurrer

Government contract; claims for increased cost under National Industrial Recovery Act.—It is held that claims for increased costs to contractors and subcontractors by reason of compliance with the provisions of the National Industrial Recovery Act, brought under the Act of June 25, 1938, must have been filed in accordance with the provisions of Section 4 of the Act of June 16, 1934.

Mr. Solomon Block for the plaintiff.

Mr. J. H. Reddy, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. G. C. Sherrod* was on the brief.

The demurrer was sustained and the petition dismissed in an opinion *per curiam*, as follows:

Plaintiff brings this cause of action to recover $52,014.78 for increased costs of performing a contract entered into between it and the defendant, and bases its cause of action upon an Act of Congress approved June 25, 1938, (52 Stat. 1197,) which act conferred jurisdiction upon the Court of Claims to hear and determine and enter judgment on claims of Government contractors and subcontractors whose costs of performance were increased as a result of the enactment of the National Industrial Recovery Act of June 16, 1933, (48 Stat. 195). The defendant demurs to the petition on the ground that it fails to state a cause of action within the jurisdiction of the court.

Treating the allegations of the petition as admitted for the purposes of the demurrer, it appears that plaintiff's cause of action is one which is described and included in section

1 of the Act of 1938. In a general provision this court was given jurisdiction of such cases, but the same section includes the following proviso:

> * * * this section shall apply only to such contractors, including completing sureties and all subcontractors and materialmen, whose claims were presented within the limitation period defined in section 4 of the Act of June 16, 1934 (41 U. S. C., secs. 28–33).

Section 4 of the Act of June 16, 1934, 48 Stat. 975, reads as follows:

> SEC. 4. No claim hereunder shall be considered or allowed unless presented within six months from the date of approval of this Act or, at the option of the claimant, within six months after the completion of the contract, except in the discretion of the Comptroller General for good cause shown by the claimant.

There is no allegation in the petition that plaintiff complied with this provision and it is admitted in argument that it did not.

It is argued on behalf of plaintiff that these provisions were not intended to bar those who had not filed claims in accordance therewith, but we can see no other possible construction.

The demurrer must be sustained and the plaintiff's action dismissed. It is so ordered.

FRANK CAMPBELL AND ANZONETTA E. CAMPBELL v. THE UNITED STATES

[No. 44662. Decided November 6, 1939]

On Motion To Dismiss for Lack of Jurisdiction

Damages; jurisdiction; case sounding in tort.—Where manifestly the case is one solely in tort, it is held that the Court of Claims is without jurisdiction.

WILLIAMS, *Judge*, delivered the opinion of the court:

The petition in substance alleges that on or about September 6, 1937, the petitioners were the joint owners of a certain houseboat located in or near the mouth of the Wolf

River at Memphis, Tennessee; that they used the said houseboat as their residence and work-shop, the petitioner Frank Campbell being a boat mechanic by trade; that on that date a tug boat, known as the "Mud Hen," belonging to the War Department of the United States, was being operated by the United States Engineers' Office located at West Memphis, Arkansas; that the said tug boat was engaged in servicing the "Omega," another boat belonging to the War Department of the United States and operated by the aforesaid office in excavating a portion of the Wolf River near the spot where petitioners' houseboat was anchored.

Petitioners further allege that the tug boat in passing petitioners' houseboat on that date was operated in such a fast, negligent, reckless, and careless manner that petitioners' houseboat, together with all their personal possessions, were caused to be sunk and destroyed. It is alleged that the houseboat, together with the personal property contained therein, including valuable tools, wearing apparel, furniture, and household utensils, were reasonably worth $500.

It clearly appears from the petition filed herein and the declarations filed by these petitioners in the United States District Court for the Western District of Tennessee, annexed to the petition as "Exhibit A," that the damages complained of resulted from the alleged negligent operation of a vessel owned by the United States and operated by the United States Engineers. It is alleged that the wash created by the reckless and fast navigation past the houseboat of the petitioners caused the loss and damage sought to be recovered.

Manifestly the case stated in the petition is solely one in tort and therefore is not within the jurisdiction of the court. *Schillinger* v. *United States*, 155 U. S. 163; *Basso* v. *United States*, 239 U. S. 602; *Holland-American Line* v. *United States*, 254 U. S. 148. The petition will have to be dismissed. It is so ordered.

LITTLETON, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

CASES DECIDED

IN

THE COURT OF CLAIMS

April 18, 1939 to December 3, 1939

INCLUSIVE, IN WHICH, EXCEPT AS OTHERWISE INDICATED, JUDGMENTS WERE RENDERED WITHOUT OPINIONS

No. 43460. May 1, 1939

Lester T. Miller.

Flying pay of Army officer. Findings of fact, conclusion of law, and judgment for plaintiff in the amount of $291.84, on authority of Park Holland, 88 C. Cls. 341.

Decided May 1, 1939

17670, Congressional. James M. Carr
17709, Congressional. John T. Oakley
17724, Congressional. Frank Schatz and Harry Schatz.

Involving damages resulting from establishment of Aberdeen proving grounds. Findings of fact, with conclusions that the claims are neither legal nor equitable and that any payment thereof rests in the discretion of Congress.

No. E-154. May 1, 1939

James V. Martin.

Patent for retractable landing gear for aircraft; infringement of patent; limitation by patentee's representation; invalidity of claims; opinion of experts; interpretation of terms; nonexclusive license to use features of patent under Government contract; infringement; nominal damages; Government liability.

Petition dismissed. Opinion 86 C. Cls. 311.

On plaintiff's motion for a new trial and an amendment of the findings of fact on all the grounds on which the court

based its judgment dismissing the petition, the court issued an order, as follows:

> The court dismissed the petition on the grounds (1) that the claims in suit if valid had not been infringed, (2) that certain of the claims alleged to have been infringed were invalid under the prior art, and (3) that the Government acquired a nonexclusive license to use features of certain claims under Navy Department Contract No. 52051 of October 28, 1920. Upon consideration of the motion for a new trial and the arguments presented in support thereof, the court is of opinion and so orders that the motion be denied, except with reference to the conclusion that the contract mentioned granted to the Government a nonexclusive license to use the features of claims 3, 10, 11, 12, 13, 14, 15, 17, 18, and 19 of the patent. This ground of the motion for a new trial is allowed, but the allowance of the motion to this extent does not require any change in the findings of fact and judgment of the court.
>
> It is therefore ordered and adjudged this May 1, 1939, that the motion for a new trial be denied in part and allowed in part, the findings of fact, judgment, and opinion otherwise, to stand.

No. 42438. MAY 29, 1939

George J. Hagan Company, a Corporation.

Income tax; claim for refund. Findings of fact and conclusion of law; petition dismissed. Memorandum *per curiam:*

> It is clear from the findings of fact that plaintiff is not entitled to recover in this case and it is therefore ordered that its petition be dismissed.

No. 43506. MAY 29, 1939

Marden Construction Company, Inc., a Corporation.

Government contract; extra work. Findings of fact and conclusion of law; petition dismissed.

No. 43702. MAY 29, 1939

George Bale.

Retirement pay of enlisted man, U. S. A. Findings of fact and conclusion of law. Judgment for plaintiff. See *Blackett* v. *United States*, 81 C. Cls. 884; *Standerson* v. *United States*, 83 C. Cls. 633, and *Halub* v. *United States*, 85 C. Cls. 701.

Upon report from the General Accounting Office, filed August 26, 1939, showing the amount due, the Court on October 2, 1939, entered judgment for the plaintiff in the sum of $2,499.33.

No. 43842. MAY 29, 1939

Gordon K. Lambert.

Rental allowance; Lieutenant, Junior Grade, Medical Corps, U. S. Navy. Findings of fact and conclusion of law. Judgment for the plaintiff.

Upon report from the General Accounting Office, filed July 29, 1939, showing the amount due, the Court on November 6, 1939, entered judgment for the plaintiff in the sum of $1,594.87.

No. 43889. MAY 29, 1939

Gordon Cook.

Rental and subsistence allowance on account of dependent; First Lieutenant, Infantry Reserve, U. S. A., on active duty with Civilian Conservation Corps. Findings of fact and conclusion of law. Judgment for the plaintiff in the sum of $475.91.

PROPERTY TAKEN FOR NAVAL USE, NORFOLK, VA.

No. 33984. *Willard R. Cook & Company, Inc.*
No. 33988. *A. E. Krise, Receiver for Fidelity Land and Investment Corporation*
No. 34049. *Charles H. Consolvo, Receiver for Pine Beach Hotel Corporation*
No. 34727. *Bruce Lowenberg, Administrator of the Estate of Harry L. Lowenberg, Deceased, et al.*
No. 34751. *D. H. Goodman, Receiver of Norfolk-Hampton Roads Company*
No. 34681. *George W. Maupin, Administrator of the Estate of William G. Maupin, Jr., Deceased, and in His Own Right, et al.*

Decided MAY 29, 1939

The court made special findings of fact as follows:

1. Each of the foregoing captioned cases was brought pursuant to a special jurisdictional act approved June 30, 1938 (52 Stat. 1444), which reads as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress

assembled, That the Court of Claims of the United States be, and it is hereby authorized and directed to reopen the following just-compensation cases on its docket, heretofore disposed of by said court, to wit: Willard R. Cook and Company, Incorporated, against United States (numbered 33984); A. E. Krise, receiver of the Fidelity Land and Investment Corporation (formerly Fidelity Land and Investment Corporation) against United States (numbered 33988); Pine Beach Hotel Corporation (now represented by Charles H. Consolvo and A. E. Campe, its receivers) and others against United States (numbered 34049); Harry L. Lowenberg and others against United States (numbered 34727); Norfolk-Hampton Roads Company against United States (numbered 34751) (all of Norfolk, Virginia); William G. Maupin, Junior, and others (now represented by George W. Maupin, as administrator and in his own right, E. Griffith Maupin, S. Dawson Maupin, Alliene Maupin, and Ruth Maupin, all of Portsmouth, Virginia) docket numbered 34681; and to ascertain and determine from the special findings of fact as therein made and recorded by said court, and with due regard to the requirements of the Act applicable thereto under which such properties were taken and the fifth amendment to the Constitution of the United States, as defined by the Supreme Court in the case of Seaboard Air Line Railway against United States (261 U. S. 299), and other like cases, the amount of just compensation by way of interest, if any, at the proper rate alleged to be due and owing by the United States to the parties plaintiff from the date of taking to the time of the payment to them of the original judgments in each of said cases for their lands situate at Hampton Roads, Virginia, and taken for public use by the United States on June 28, 1917, by authority of the Act of Congress of June 15, 1917 (ch. 29, 40 Stat. 207–208), and taken for public use by the United States on September 20, 1918, by authority of Acts of Congress of May 16, 1918 (40 Stat. 550–551), and June 4, 1918 (40 Stat. 595), and an Executive order of the President dated June 18, 1918.

SEC. 2. If said court in such determination from the record in said cases shall find that it failed to include in its judgment in said cases the item of interest at a proper rate, or the equivalent thereof, as an element or part of just compensation then due said parties plaintiff for their said property, then it shall have

jurisdiction to correct the same and adjudge to said parties plaintiff and against the United States in each of the above-specified cases such additional sum of money as may be determined by the court under section 1 of this Act, with interest thereon at the proper rate from the date of payment of the several judgments therein, until March 5, 1925, irrespective of any delay upon the part of the executive departments to see that just compensation is accorded to said landowners in respect of the premises, or any existing statute of limitation, or any other law to the contrary notwithstanding, except that either party litigant shall have the right to petition the Supreme Court of the United States for a writ of certiorari, as in other cases in the Court of Claims.

SEC. 3. The said court shall promptly proceed in said causes, each and all, upon motions filed therein by the parties plaintiff with the clerk of said court, if so filed within four months after the date of the approval of this Act.

2. The record discloses that in each of the cases named in the jurisdictional act the court failed to include in its judgment, as a part of the just compensation awarded the respective plaintiffs for the taking of their properties, interest at a proper rate or the equivalent thereof.

3. The legal rate of interest from 1917 to the present time in the State of Virginia, where the parcels of real estate involved in these cases were located, has been six percent per annum.

The average rates on prime commercial paper and average yields on high-grade bonds as shown by government, corporate, and municipal issues, during the period beginning January 1, 1917, and ending December 31, 1938, were as follows:

	Percent per annum
1. Prime commercial paper, 4–6 months	3.76
2. High-grade corporate bonds	4.61
3. U. S. Government bonds	3.65
4. High-grade municipal bonds	4.11

4. In the case of *Willard R. Cook & Company, Inc.*, No. 33984, the Court in its decision on June 28, 1920 (55 C. Cls. 537), found that the reasonable value of all plaintiff's property at the time it was taken and appropriated by the defend-

ant on June 28, 1917, was $106,817.89, and that a payment on the property was made to plaintiff on May 6, 1918, in the amount of $62,715.00. Judgment for the difference was rendered on June 28, 1920, and was paid to plaintiff on March 5, 1921, in the amount of $44,102.89.

Had the Court included in its judgment interest at the rate of 6 percent from the date of the taking of the property to the date of the payment of the judgment plaintiff would have received $13,906.07 in excess of the amount paid. Interest on this amount at the rate of 6 percent from the date of payment to March 5, 1925, is $3,339.82, making a total balance due March 5, 1925, of $17,245.89.

5. In the case of *A. E. Krise, Receiver for Fidelity Land & Investment Corporation*, No. 33988, the Court in its decision on June 28, 1920 (55 C. Cls. 537), found that the reasonable value of all the property of the plaintiff at the time it was taken and appropriated by the defendant on June 28, 1917, was $493,965.00, and that a payment on the property was made to plaintiff on May 6, 1918, in the amount of $275,395.50. Judgment for the difference was rendered on June 28, 1920, and was paid to plaintiff on March 5, 1921, in the amount of $218,569.50.

Had the Court included in its judgment interest at the rate of 6 percent from the date of the taking of the property to the date of the payment of the judgment plaintiff would have received $66,791.99 in excess of the amount paid. Interest on this amount at the rate of 6 percent from the date of payment to March 5, 1925, is $16,041.43, making a total balance due March 5, 1925, of $82,833.42.

6. In the case of *Charles H. Consolvo, Receiver for Pine Beach Hotel Corporation*, No. 34049, the Court in its decision on January 3, 1921 (56 C. Cls. 482), found that the reasonable value of all property of the plaintiff at the time it was taken and appropriated by the defendant on June 28, 1917, was $195,000.00, and that a payment on the property was made to plaintiff on May 10, 1918, in the amount of $113,775.00. Judgment for the difference was rendered on January 3, 1921, and was paid to plaintiff on April 8, 1922, in the amount of $81,225.00.

Had the Court included in its judgment interest at the rate of 6 percent from the date of the taking of the property to the date of the payment of the judgment plaintiff would have received $31,587.19 in excess of the amount paid. Interest on this amount at the rate of 6 percent from the date of payment to March 5, 1925, is $5,514.18, making a total balance due March 5, 1925, of $37,101.37.

7. In the case of *Bruce Lowenberg, Administrator of the Estate of Harry L. Lowenberg, deceased, et al.*, No. 34727, the Court in its decision on June 12, 1922 (57 C. Cls. 617), found that the reasonable value of all property of the plaintiffs at the time it was taken and appropriated by the defendant on June 28, 1917, was $51,074.10, and that a payment on the property was made to plaintiffs on June 4, 1918, in the amount of $30,000.00. Judgment for the difference was rendered on June 12, 1922, and was paid to plaintiffs on September 30, 1922, in the amount of $21,074.10.

Had the court included in its judgment interest at the rate of 6 percent from the date of the taking of the property to the date of the payment of the judgment plaintiffs would have received $9,075.74 in excess of the amount paid. Interest on this amount at the rate of 6 percent from the date of payment to March 5, 1925, is $1,323.33, making a total balance due March 5, 1925, of $10,399.07.

After this case was reopened, an order of Court was entered substituting certain parties plaintiffs. The claim is now owned as follows: 5/8ths thereof by Bruce Lowenberg, administrator of the estate of Harry L. Lowenberg, deceased; 1/8th by Benjamin Lowenberg; 1/8th by Jacob Lowenberg; and 1/8th by Minnie L. Campe.

8. In the case of *D. H. Goodman, Receiver of Norfolk-Hampton Roads Co.*, No. 34751, the Court in its decision on June 26, 1922 (57 C. Cls. 620), found that the reasonable value of all plaintiff's property at the time it was taken and appropriated by the defendant on June 28, 1917, was $68,500, and that a payment on the property was made to plaintiff on October 11, 1922, in the amount of $35,500. Judgment for the difference was rendered on June 26, 1922, and was paid to plaintiff on April 12, 1924, in the amount of $33,000.

Had the court included in its judgment interest at the rate of 6 percent from the date of the taking of the property to the date of the payment of the judgment plaintiff would have received $26,684.60 in excess of the amount paid. Interest on this amount at the rate of 6 percent from the date of payment to March 5, 1925, is $1,434.29, making a total balance due March 5, 1925, of $28,118.89.

9. In the case of *George W. Maupin, Administrator of the Estate of William G. Maupin, Jr., Deceased, and in His Own Right, et al.*, No. 34681, the Court in its decision on April 3, 1922 (57 C. Cls. 609), found that the reasonable value of all plaintiffs' property at the time it was taken and appropriated by the defendant on September 20, 1918, was $97,325.02, and that a payment on the property was made to plaintiffs on March 29, 1920, in the amount of $45,047.59. Judgment for the difference was rendered on April 3, 1922, and was paid to plaintiffs on June 18, 1922, in the amount of $52,277.43.

Had the court included in its judgment interest at the rate of 6 percent from the date of the taking of the property to the date of the payment of the judgment plaintiffs would have received $17,051.09 in excess of the amount paid. Interest on this amount at the rate of 6 percent from the date of payment to March 5, 1925, is $2,777.62, making a total balance due March 5, 1925, of $19,828.71.

After this case was reopened, by an order of Court duly entered certain parties plaintiffs were substituted. This claim is owned as follows: George W. Maupin, 1/14th interest; George W. Maupin, executor of the estate of Ruth Maupin, deceased, 1/14th interest; George W. Maupin, administrator of the estate of E. G. Maupin, deceased, 1/14th interest; George W. Maupin, administrator of the estate of Mattie Maupin, deceased, 1/14th interest; S. Dawson Maupin, 1/14th interest; Alliene Maupin, 1/14th interest; and William G. Maupin, 8/14th interest.

CONCLUSIONS OF LAW

Upon the foregoing special findings of fact, which were made a part of the judgments herein, the court decided as

conclusions of law that plaintiffs were entitled to recover as follows:

Willard R. Cook & Company, Inc., No. 33984, seventeen thousand two hundred forty-five dollars and eighty-nine cents ($17,245.89).

A. E. Krise, Receiver for Fidelity Land and Investment Corporation, No. 33988, eighty-two thousand eight hundred thirty-three dollars and forty-two cents ($82,833.42).

Charles H. Consolvo, Receiver for Pine Beach Hotel Corporation, No. 34049, thirty-seven thousand one hundred one dollars and thirty-seven cents ($37,101.37).

Bruce Lowenberg, Administrator of the Estate of Harry L. Lowenberg, deceased, et al., No. 34727, ten thousand three hundred ninety-nine dollars and seven cents ($10,399.07).

D. H. Goodman, Receiver of Norfolk-Hampton Roads Co., No. 34751, twenty-eight thousand one hundred eighteen dollars and eighty-nine cents ($28,118.89).

George W. Maupin, Administrator of the Estate of William G. Maupin, Jr., Deceased, and in His Own Right, et al., No. 34681, nineteen thousand eight hundred twenty-eight dollars and seventy-one cents ($19,828.71).

No. 43363. JUNE 19, 1939

Land O'Lakes Creameries, Inc.

Oral agreement to purchase butter on the open market on behalf of the Government, in order to support and stabilize the market; reimbursement for actual cost of butter purchased and proper overhead costs applicable thereto. Findings of fact, upon stipulation, and conclusion of law. Judgment for the plaintiff in the sum of $47,500.

No. 43529. JUNE 19, 1939

Charles McIntyre.

Property of noncommissioned officer, U. S. Army, destroyed by fire; Act of March 4, 1921. Findings of fact and conclusion of law. Judgment for the plaintiff in the sum of $574.

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No. 43853. JUNE 19, 1939

Lon D. Worsham Company, A Partnership.

Government contract; construction of buildings for Civilian Conservation Corps camps; delay in delivery of materials by the Government; extra work. Findings of fact and conclusion of law. Judgment for the plaintiff in the sum of $5,161.

No. 43856. JUNE 19, 1939

Alba W. Hall.

Pay and subsistence allowance, Second Lieutenant, Coast Artillery Corps Reserve, U. S. A., on active duty with Regular Army; appointment to Reserve Corps void for illegality; not a United States citizen. Findings of fact and conclusion of law. Petition dismissed.

COTTON LINTER CASES

In the following cases involving claims for damages for breach of World War contracts for cotton linters, judgments against the Government were rendered as indicated, pursuant to the stipulation filed in the case of ***Rose City Cotton Oil Mill* v. *United States***, Congressional, No. 17341, and all other pending cotton linter cases as per list attached to said stipulation:

JUNE 19, 1939

No. 17399, Congressional. W. N. Banks, Receiver of Grantville Cotton Oil Company, $3,634.34.

No. 17402, Congressional. Claude Christopher, Receiver of Walker Brothers Company, $2,952.73.

No. 17585, Congressional. J. D. Brightwell, Receiver of Kaufman Cotton Oil Company, $2,682.78.

No. J-683. JUNE 20, 1939

Aluminum Company of America.

Interest on amounts withheld by the Government. In accordance with its decision of May 2, 1938 (87 C. Cls. 96) and upon a stipulation by the parties filed June 12, 1939, as to the amounts due under said decision, the court decided "that the defendant is not entitled to recover the amount of $30,146.01 as interest it now claims as an additional offset,"

and the court further decided and ordered that judgment be entered in favor of the plaintiff in the sum of $254,271.22 together with interest amounting to $79,832.68, or a total sum of $334,103.90.

No. 43532. JUNE 20, 1939

William Bennett.

Pay and allowances; effect of Presidential pardon on conduct marks for retirement pay. In accordance with its decision of April 3, 1939, in the case (88 C. Cls. 602) and upon a report from the General Accounting Office showing the amount due under the ruling of the Court, judgment was rendered in favor of the plaintiff in the sum of $894.44.

No. K–355. JUNE 20, 1939

Obschestwo Wykownskich Metallugicheskich I Mechanicheskich Sawodow.

In the above-entitled case the petition was dismissed in an order as follows:

> This case was submitted on defendant's plea to the jurisdiction under which it is contended that the petition should be dismissed for the reason that it was not filed within six years after the cause of action accrued. Plaintiffs are aliens entitled under the statute to maintain suit against the United States in this court, but the cause of action, as set forth in the petition, accrued in 1917 and the petition was not filed until August 20, 1929. The plea to the jurisdiction must be sustained under the decision of this court in Francesco Pacifico, 80 C. Cls. 391. It is therefore
>
> Ordered, decided, and adjudged this 20th day of June, 1939, that the petition be and the same hereby is dismissed for the reason that the petition was not filed within the time required by section 156 of the Judicial Code as amended and the court is without jurisdiction of the case.

No. 43514. OCTOBER 2, 1939

International Milling Company.

Income tax; credit to corporation for foreign tax paid by subsidiary. In accordance with its opinion of May 29, 1939,

ante, p. 128, and upon a stipulation by the parties, the Court rendered a judgment for the plaintiff in the sum of $2,581.76 with interest thereon from August 16, 1932, and the sum of $8,239.03 with interest thereon from July 17, 1933; a total of $10,820.79 with interest.

No. 43588. OCTOBER 2, 1939

James A. Greenwald, Jr.

Navy pay; effective date of retirement. Opinion 88 C. Cls. 264. Defendant's motion for new trial overruled.

No. 43802. OCTOBER 2, 1939

Clinton E. Johnson.

Damages; illegal discharge of postal employe; statute of limitations. Opinion 87 C. Cls. 270. Plaintiff's motion for new trial overruled.

No. 42717. NOVEMBER 6, 1939

Robert W. Morrell and Frank W. Morrell, Executors of the Estate of Joseph B. Morrell, Deceased.

Income and excess profits tax; claim for refund following determination by Board of Tax Appeals. Petition dismissed, following the decision in the companion case of *Amos D. Carver*, *ante* p. 252.

No. 44084. NOVEMBER 6, 1939

Tennessee Consolidated Coal Company.

Income tax; constitutionality of the statutes imposing taxes on capital stock and excess profits. Demurrer sustained and petition dismissed, following the decision in the case of *Allied Agents, Inc.*, 88 C. Cls. 315, (certiorari denied October 9, 1939) 308 U. S. —.

No. 43622. NOVEMBER 6, 1939

William F. Fitzgerald, Jr.

Rental allowance, commutation of quarters; lieutenant commander in United States Navy; dependent mother. Findings of fact and conclusion of law. Judgment for the plaintiff in the sum of $2,092.58.

No. 43084. JANUARY 8, 1940

John McShain, Inc.

Government contract; extra work; failure to appeal. Opinion 88 C. Cls. 284.

On mandate of the Supreme Court, (*post*, 557) reversing the decision of the Court of Claims (308 U. S. 520) the Court entered judgment, in an order as follows:

ORDER

This case comes before the court on mandate of the Supreme Court; and it appearing that on February 6, 1939, the Court of Claims filed special findings of fact, with an opinion holding that plaintiff was entitled to recover and entering judgment in its behalf in the sum of $3,227.93; and it further appearing that on November 6, 1939, the Supreme Court of the United States reversed the decision of this court "to the extent that it includes the $1,877.93 alleged to be due from the United States in paragraphs XIV through XXIV of the petition to the Court of Claims; and this cause be, and the same is hereby, remanded to the Court of Claims with instructions to enter judgment in favor of the United States with regard to this item"—now, therefore, in conformity to said mandate of the Supreme Court, it is ordered this 8th day of January, 1940, that judgment be and the same is entered in favor of plaintiff in the sum of one thousand, three hundred fifty dollars ($1,350), this amount being the difference between the amount of $3,227.93 entered as judgment in favor of the plaintiff by this court February 6, 1939, and the amount of $1,877.93 reversed by the Supreme Court and directed to be entered in favor of the United States.

CASES DISMISSED BY THE COURT OF CLAIMS ON MOTION OF PARTIES, OR OF THE COURT FOR NONPROSECUTION

Cases Pertaining to Refund of Taxes

ON APRIL 29, 1939

41858. Wheeling Steel Corporation.

ON MAY 1, 1939

43108. Rogers, Brown & Co.
43284. Franklin Life Insurance Co.
43603. Rogers, Brown & Co.
43667. Marshall Field & Co.

ON MAY 29, 1939

43262. Irving Trust Co. et al., executors.
43653. Consolidated Electric & Gas Co.
44661. George H. Warrington.

ON JUNE 19, 1939

43744. International Business Machines Corporation.
43745. International Business Machines Corporation.
43746. International Business Machines Corporation.
43852. International Agricultural Corporation.
44591. Melco Realty Company.

ON JULY 13, 1939

42870. Stanolind Crude Oil Purchasing Company, a Corporation.

ON SEPTEMBER 13, 1939

44636. Beatrice Ayer Patton.

ON SEPTEMBER 18, 1939

H-422. John C. Harris, trustee (O. K. Battery Co.)
H-506. Vesta Battery Corporation.
43356. Rubin & Mitnick, Inc.
43407. Harry M. Crandall.
43991. Lamar Fluhart.
43992. Florence Fluhart Poston.
44402. Pennsylvania Sugar Company.
44739. Valentine Laboratories, Inc.

ON OCTOBER 2, 1939

42280. The Patton Clay Manufacturing Company.
43523. National Candy Company.
43524. Helen M. Dunigan, Administratrix.
43637. Moses W. Glick, Flora S. Glick.
43638. Sidney Deutsch, Miriam Deutsch.

ON NOVEMBER 6, 1939

42842. Van Dorn Iron Works Co.
43349. Walter Roosevelt Thompson.
43472. French & Hecht et al.
43552. Clara J. Robertson et al.
43591. The Union & New Haven Trust Co.
43755. Jay Holmes.
43784. Swiss Reinsurance Company.
43987. Hugh P. Nunnally et al.
44925. Allegheny Ludlum Steel Corporation.

ON NOVEMBER 18, 1939

(On the authority of Allied Agents, Inc., 88 C. Cls. 315)

44039. Employees Welfare Association, Inc., a Corporation.
44057. New Jersey Power & Light Co.
44058. Northern Pennsylvania Power Co.
44059. The Utility Management Corp.
44060. The Utility Management Corp., etc., a Corporation.
44061. Metropolitan Edison Company.
44062. South Carolina Electric and Gas Co., etc., a Corporation.
44063. Lexington Water Power Company.
44064. Reading Street Railway Company, a Corporation, etc.
44112. NY PA NJ Utilities Company, etc.
44122. Kentucky-Tennessee Light & Power Company, etc., a corp.
44123. Associated Electric Co., a corp.
44124. Utilities Employees Securities Company, a corp.
44125. General Gas & Electric Corporation, a corp.
44126. Virginia Public Service Co., a corp.
44127. York Steam Heating Co., a corp.
44128. United Coach Company, etc., a corp.
44129. Pennsylvania Edison Co., etc., a corp.
44133. The Associated Corporation, a corp.
44134. Staten Island Coach Company, a corp.
44135. Tide Water Power Co., a corp.
44136. Florida Power Corporation, a corp.
44137. Blair Engineering and Supply Co., a corp.
44138. Keystone Public Service Co., a corp.
44139. Glen Rock Electric Light & Power Co., a corp.
44140. Edison Light & Power Company, a corp.
44141. Pennsylvania Investing Corporation, a corp.
44142. Georgia Power & Light Company, a corp.
44156. Erie Lighting Company, a corp.
44157. New England Capital Corporation, a corp.
44158. Triple Cities Traction Corporation, a corp.
44159. Cambridge Electric Light Company, a corp.
44160. Associated General Utilities Company, a corp.
44161. Central U. S. Utilities Company, etc., a corp.
44162. Staten Island Edison Corporation, a corp.
44163. The Patchogue Electric Light Company, a corp.
44164. Cape and Vineyard Electric Company, a corp.
44165. New York State Electric and Gas Corporation, etc., a corp.
44166. New Hampshire Gas and Electric Company, a corp.
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ABSTRACT OF DECISIONS

OF

THE SUPREME COURT

IN COURT OF CLAIMS CASES

ROBERT H. MONTGOMERY v. THE UNITED STATES

[No. 43136]

[87 C. Cls. 218; 307 U. S. 632]

Income tax; deduction of additional State tax; ascertainment of loss; gift to son; depreciation on property acquired by gift. Judgment for plaintiff May 2, 1938; plaintiff's motion for new trial overruled November 14, 1938.

Petition for writ of certiorari *denied* by the Supreme Court, May 15, 1939.

UNITED STATES TRUST COMPANY OF NEW YORK, EXECUTOR AND TRUSTEE OF THE ESTATE OF SARAH POSTLETHWAITE BARBER, DECEASED, v. THE UNITED STATES

[No. 42875]

[87 C. Cls. 721; 307 U. S. 633]

Estate tax; transfer made in contemplation of death; statute of limitations. Petition dismissed May 31, 1938; plaintiff's motion for new trial overruled, January 9, 1939.

Petition for writ of certiorari *denied* by the Supreme Court, May 22, 1939.

GEORGE F. SEIBERLING, J. THOMAS SCHANTZ, AND NOLAN P. BENNER, EXECUTORS UNDER THE LAST WILL AND TESTAMENT OF HARRY C. TREXLER, v. THE UNITED STATES

[No. 42094]

[87 C. Cls. 611; 307 U. S. 634]

Income tax; time for filing claim for refund. Petition dismissed March 7, 1938; plaintiffs' motion for new trial overruled December 5, 1938.

Petition for writ of certiorari *denied* by the Supreme Court, May 22, 1939.

LEHIGH VALLEY TRUST CO., AND EDWIN J. STEINER, EXECUTORS OF THE ESTATE OF FRED H. STEINER, DECEASED, v. THE UNITED STATES

[No. 42095]

[87 C. Cls. 631; 307 U. S. 634]

Income tax; time for filing claim for refund. Petition dismissed March 7, 1938; plaintiffs' motion for new trial overruled December 5, 1938.

Petition for writ of certiorari *denied* by the Supreme Court, May 22, 1939.

BERRY OIL COMPANY v. THE UNITED STATES

[No. 43258]

[87 C. Cls. 546; 307 U. S. 634]

Income tax; deduction for depletion; payment not a bonus or advance royalty; interest in remaining one-half. Petition dismissed, November 4, 1938.

Petition for writ of certiorari *denied* by the Supreme Court, May 22, 1939.

EMIL OLSSON v. THE UNITED STATES

[No. B-154]

[87 C. Cls. 642; 307 U. S. 621, 650]

Patent, validity, infringement, and utility; use; measure of compensation. Judgment for plaintiff, May 31, 1938; findings of fact amended and plaintiff's motion for new trial overruled December 5, 1938.

Petition for writ of certiorari *denied* by the Supreme Court, April 24, 1939. Rehearing denied, May 22, 1939.

ARTHUR C. HARVEY CO. v. THE UNITED STATES

[No. 42473]

[87 C. Cls. 320, 747; 305 U. S. 642]

Rehearing *denied* by the Supreme Court, May 29, 1939.

THE CHICKASAW NATION v. THE UNITED STATES

[No. K-376]

[87 C. Cls. 91; 307 U. S. 646]

Indian claims; expenditure of tribal funds for school purposes; distribution of tribal funds. Petition dismissed, April 4, 1938; plaintiff's motion for new trial overruled November 14, 1938; plaintiff's second motion for new trial overruled January 19, 1939.

Petition for writ of certiorari *denied* by the Supreme Court, June 5, 1939.

MOHAWK RUBBER COMPANY v. THE UNITED STATES

[No. 43409]

[88 C. Cls. 50; 307 U. S. 645]

Income tax; claim for refund; protest as to disallowance not a claim for credit; statutory limitations. Petition dis-

missed November 14, 1938; plaintiff's motion for new trial overruled February 6, 1939.

Petition for writ of certiorari *denied* by the Supreme Court, June 5, 1939.

SOUTHERN PACIFIC COMPANY, PETITIONER, v. THE UNITED STATES

[No. 42403. Decided June 6, 1938]

[87 C. Cls. 442]

Certiorari to review a judgment of the Court of Claims dismissing the petition in a suit brought by the railroad company to recover sums claimed to be due on account of transportation charges.

The judgment of the Court was *affirmed* May 29, 1939 (307 U. S. 393), the Supreme Court deciding:

1. Where a land grant railroad, having an established route partly land-grant aided between two terminal points, developed an alternative route which in part was identical with the original route and to that extent land-grant aided, *held* that the Government was entitled, under its land-grant Act contract, to compensate the railroad for terminal-to-terminal-service on the basis of the lower tariff available on the alternative route less the higher land grant percentage deduction applicable on the original route, irrespective of what route was actually used in shipment.

2. This conclusion is consistent with the long continued administrative construction given land grant contracts.

3. Doubts in respect of the interpretation of public grants are to be resolved in favor of the Government.

Mr. Justice REED delivered the opinion of the Court, as follows:

This case involves the right of the Government to deduct from the public terminal-to-terminal tariffs of a railroad over a route, partly of land-grant aided mileage, identical with part of the mileage of another earlier constructed route of the same road between the same terminals, sums based upon the higher proportion of land-grant aided mileage in this latter route. On ac-

count of the importance of the question in administration, certiorari was granted.[1]

The carrier owns and operates two lines of railroad between Portland, Oregon, and Roseville, California, and Davis, California, both southern points being on the Central Pacific, now the Southern Pacific, Railroad in California. From the California junctions, there is direct connection over the same Southern Pacific rails into San Francisco. The older line is called the Siskiyou, the newer the Cascade Route. For a considerable portion of the distance between Portland and San Francisco, the two routes are identical. There are two differences; one is between Eugene, Oregon, and Black Butte, California. On the west the Siskiyou Route passes through Grant's Pass and Siskiyou, a distance of 300 miles, to connect Eugene and Black Butte. The eastern, or Cascade Route, joins the same two points by a shorter (275 miles) line through Natron and Klamath Falls. The second deviation is between Tehama, California, and Davis and Roseville respectively. Here the Siskiyou Route is to the east, 104 miles long, and the Cascade Route to the west, 110 miles.

Where the routes are identical, some of the mileage is land-grant aided. Some is not. The mileage of the Siskiyou which is different from the Cascade is largely land-grant aided. None of the Cascade Route, except where it uses the same rails as the Siskiyou, has land grants. Based on the proportion of aided mileage and the percentage of deduction allowed to the Government from the tariffs charged private shippers, the United States, between San Francisco and Portland, is entitled to a land-grant deduction via the Siskiyou Route of 42.792 per cent. Via the Cascade Route, the deduction is 17.801 per cent. There are slight variations for East Portland.

During December, 1931, and January, 1932, the carrier transported, in both directions, certain property of

[1] Cf. Schedule of Land-Grant and Bond-Aided Railroads of the U. S., Office of the Quartermaster General of the Army, Circular No. 4, February 1, 1922. This shows the land-grant mileage in the United States at the date of issue. In order to obtain a share of government traffic, non-land-grant roads have entered widely into freight land-grant equalization agreements by which they agree to carry freight, routed over their lines at "the lowest net rates lawfully available, as derived through deductions account of land-grant distance. * * *" Cf. Circular 3, Feb. 6, 1935, Office of Quartermaster General, War Department, Freight Land-Grant Equalization Agreements.

the United States on Government bills of lading from Portland or East Portland to San Francisco. No directions were given by the Government as to the routes over which the shipments were to move. While before November 11, 1931, the terminal-to-terminal rates over the two routes were the same, after that date authorized revisions resulted in a rate competitive with water borne commerce over the Cascade and a higher rate over the Siskiyou. These public tariffs were so much lower over the Cascade than they were over the Siskiyou Route, that the net cost to the Government, after the deductions deemed applicable by the railroad, was less over the Cascade than it was over the Siskiyou, despite the higher percentage of deduction allowed the latter route.

The Government was billed on the Cascade tariffs with deductions for land-grant mileage of about 17 per cent. It paid on the basis of the Cascade tariffs but deducted on the ratio of the land-grant to total miles between the terminals on the Siskiyou Route, or some 42 per cent. The Government claims that it is entitled to the lowest rate, between the terminals, less the percentage of deduction over the original land-grant aided route. The carrier protested and brought this action in the Court of Claims to recover the difference between the Cascade tariffs less the Cascade ratio of land-grant mileage and that paid by the Government, the Cascade tariffs less the Siskiyou ratio. The Court of Claims, after making special findings of fact, adjudged that the carrier was not entitled to recover and dismissed its petition.

The Government obtained concessions from the established tariffs by virtue of the acceptance by the carrier of grants of land, ten alternate sections per mile on each side of the line, to aid in the construction of a railroad as described in the statute authorizing the conveyance (14 Stat. 239). This statute was similar in form to the land grant construed in *Burke* v. *Southern Pacific Railroad Company* (234 U. S. 669), and upon compliance with its requirements became a contract, "obligatory on both" the carrier and Government. The carrier agreed it should "be and remain a public highway for the use of the government of the United States, free of all toll or other charges upon the transportation of the property or troops of the United States; and the same shall be transported over said road at the cost,

charge, and expense of the corporations or companies owning or operating the same, when so required by the government of the United States." The authorization was "to lay out, locate, construct, finish, and maintain a railroad and telegraph line between the city of Portland, in Oregon, and the Central Pacific Railroad, in California, * * *." The road was located in accordance with these requirements.

In December, 1887, the Siskiyou Route was finished. The road running from its southern terminus at Roseville to San Francisco had been finished in 1870. This gave a through route from San Francisco to Portland, 774.16 miles long with 663.16 land-grant aided. The Cascade Route was built later in small sections primarily for local service or links in other projected distinct railroad undertakings. The California deviation from the Siskiyou between Tehama and Davis was finished in 1882. The Oregon section, forming with that portion of the Siskiyou an irregular ovoid figure, was put together between 1905 and 1926, being completed September first of the latter year. This route is 725.03 miles between Portland and San Francisco with 258.13 miles built with grants in aid. Each route is necessary for adequate transportation service to the areas traversed. At the time of the completion of the Cascade and until November 10, 1931, the tariffs over the two routes between the terminals were the same.

On May 23, 1928, there was enacted an act for the relief of the land-grant railroad operated between East Portland, Oregon, and Roseville, California (45 Stat. 722–723). As Roseville is the junction terminal of the Siskiyou and is not served by the Cascade, this description covers only the Siskiyou line built under the 1866 act. By its terms, the Government relinquished its privilege of free transportation and accepted in lieu thereof a right to the same rate as is paid to other land-grant roads. This is fifty per cent of the public tariff for land-grant aided mileage.[2]

The Act of 1866, granting the aid, specified, only generally, the route of the new road. It was to begin at some point on the Central Pacific Railroad in the Sacra-

[2] *Lake Superior & Mississippi R. R. Co.* v. *United States*, 93 U. S. 442, 454, 455; *L. & N. R. R.* v. *United States*, 273 U. S. 321, 323. Act of June 7, 1924, c. 291, 43 Stat. 477, 486. This act determined the proportion of the regular tariff to be paid for the transportation.

mento Valley and thence run northerly to Portland. By the grant of millions of acres of public lands, the Government prepaid for transportation over the line, wherever it might be built. (*L. & N. R. R.* v. *United States*, 267 U. S. 395, 402.) It was entitled to service for its property or troops without further cost from whomsoever owned or operated the aided facility between the Central Pacific and Portland. (14 Stat. 240). By the 1928 act, the Government agreed, for the "relief of the land-grant" road, to put it upon the same basis as other land-grant roads. By this concession, no change was made in the extent of the obligation to give land-grant service.

The two acts are quite clear in their requirement that the company which constructed the road or its successors in ownership or operation should transport the property or troops of the United States over the railroad at the rate fixed by their provisions. The uncertainty as to the meaning arises in the application of the right of transportation to the mileage. On completion of the original project between Portland and the Central Pacific, there was a definite right of way, the present Siskiyou Route, with every mile between East Portland and the Central Pacific aided by land grants. This same situation existed as to all or parts of other bond or land aided roads.[3] Soon there were changes and shortening of these lines. The Government was faced with the problem of the proper ratio of land-grant or bond-aided deductions or allocations to be applied where new non-aid mileage is used between terminals formerly served in a higher proportion by land-grant mileage. Cut-offs and the elimination of curves furnished occasion for these decisions.

[3] The laws relating to land-grant and bond-aided railroads contain several types of conditions. The most prevalent condition was that "the said railroad shall be and remain a public highway for the use of the Government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States." This was construed to require the railroad to furnish only free use of the rails and permanent structures. *Lake Superior & Mississippi R. R. Co.* v. *United States*, 93 U. S. 442. * * * Some of the grants went further and required the railroad to furnish free transportation. * * * Others authorized the railroad to charge for Government transportation, subject to regulations which Congress might impose restricting such charges. * * * The Act of July 1, 1862, 12 Stat. 489 (Missouri Pac. Ry.), provided for fair and reasonable rates for Government transportation, not to exceed the amounts paid by private parties for the same kind of service. See Schedule of Land-Grant and Bond-Aided Railroads of the U. S., Office of the Quartermaster General of the Army, Circular No. 4, February 1, 1922.

Thus in 1888 in a ruling as to transportation services rendered by the Central Pacific Railroad, where the Central had three lines from Sacramento to San Francisco, with varying bond-aided mileages, the Comptroller of the Treasury ruled, when the road sought to render statements for the line actually used, that all United States accounts should be stated in terms of the bond-aided mileage of the original route. As the amounts due to the carrier were applied to retirement of the bonds in aid, this ruling preserved the charges for this purpose. This ruling has been followed in roads aided by land grants. The long continued administrative interpretation has decided weight in reaching a conclusion upon the construction of this contract, particularly when the Congress after such interpretation gives up a right for free transportation between the terminals. Any doubt must be resolved in favor of the Government.

The construction adopted in the Court of Claims was reached in *United States* v. *Northern Pac. Ry. Co.* (30 F. (2d) 655), where there was a shortening of 94.24 miles in the through route between St. Paul and Seattle by means of a cut-off. In that case, too, the old route was maintained for local use.

It is urged, however, that in this instance we have a new line, an addition, rather than a cut-off in or a shortening or straightening of an original line. (*United States* v. *Kansas Pac. Ry. Co.*, 99 U. S. 455; *United States* v. *Denver Pac. Ry. Co.*, 99 U. S. 460; *United States* v. *Central Pacific R. R. Co.*, 118 U. S. 235.) So far as terminal-to-terminal transportation is concerned, the Cascade Route does not function as a new line or an addition. It is simply another way of carrying goods by the same railroad between San Francisco and Portland. By which route the shipment moves is immaterial on the question of deduction for land grants. The conclusion that the lowest public tariffs are to have land-grant deductions based upon the proportion of the land-grant mileage in the original line, seems consonant with the purpose of the acts.

Mr. Justice BUTLER delivered a dissenting opinion, in which he was joined by Mr. Justice MCREYNOLDS and Mr. Justice ROBERTS.

Mr. Justice DOUGLAS took no part in the consideration or decision of this case.

ALLIED AGENTS, INC., A CORPORATION, v. THE UNITED STATES

[No. 44038]

[88 C. Cls. 315; 308 U. S. 561]

Income tax; constitutionality of the statutes imposing taxes on capital stock and excess profits; decided February 6, 1939; demurrer sustained and petition dismissed.

Petition for writ of certiorari *denied* by the Supreme Court, October 9, 1939.

IDENTIFICATION DEVICES, INC., JAMES M. RULONG, v. THE UNITED STATES

[No. 43639]

[*Ante*, p. 141; 308 U. S. 570]

Patents; validity; infringement; limitation of claim; competence of evidence; decided May 29, 1939; petition dismissed.

Petition for writ of certiorari *denied* by the Supreme Court October 9, 1939.

JOHN W. DAVIS v. THE UNITED STATES

[No. 43413]

[88 C. Cls. 579; 308 U. S. 574]

Income tax; transfer of stock in reorganization; effect of book entries; decided April 3, 1939; petition dismissed.

Petition for writ of certiorari denied by the Supreme Court October 9, 1939.

THE VIRGINIAN RAILWAY v. THE UNITED STATES

[No. 42561]

[88 C. Cls. 142; 308 U. S. 590]

Government coal; difference between export and domestic freight rate; consignee; decided December 5, 1938; petition dismissed; plaintiff's motion for new trial overruled March 6, 1939.

Petition for writ of certiorari *denied* by the Supreme Court, October 16, 1939.

FEDERAL EXPORT CORPORATION v. THE UNITED STATES

[No. H–106]

[88 C. Cls. 60; 308 U. S. 590]

Income tax; computation of income of a consolidated group of corporations; right of the court to set aside stipulation; decided November 14, 1938; plaintiff's motion for new trial overruled March 6, 1939.

Petition for writ of certiorari *denied* by the Supreme Court, October 16, 1939.

CORINNE GRIFFITH MARSHALL v. THE UNITED STATES

[No. 43286]

[88 C. Cls. 393; 308 U. S. 597]

Income tax; account stated; community property under California statute; overpayment of tax. Petition dismissed March 6, 1939; plaintiff's motion for new trial overruled May 29, 1939.

Petition for writ of certiorari *denied* by the Supreme Court October 23, 1939.

THE UNITED STATES, PETITIONER, v. JOHN McSHAIN, INC.

[No. 43084. Decided February 6, 1939, on motion for new trial]

[88 C. Cls. 284]

Writ of certiorari to review judgment of the Court of Claims deciding that plaintiff was entitled to recover for extra work on Government contract.

The judgment of the Court of Claims was *reversed* November 6, 1939, in an opinion *per curiam*, amended December 4, 1939 (308 U. S. 512, 520), as follows:

> *Per curiam:* The judgment is reversed to the extent that it includes the $1,877.93 alleged to be due from the United States in paragraphs XIV through XXIV of the petition to the Court of Claims, and the cause is remanded to the Court of Claims with instructions to enter judgment in favor of the United States with regard to this item. *Plumley* v. *United States*, 227 U. S. 545, 547; *Merrill-Ruckgaber Co.* v. *United States*, 241 U. S. 387, 393.

(*Ante*, 543)

NEW WORLD LIFE INSURANCE COMPANY, A CORPORATION, v. THE UNITED STATES

[No. 43549]

[88 C. Cls. 405; 308 U. S. 612]

Income tax; deductions allowable to a life insurance company in respect to investment expenses; decided March 6, 1939; petition dismissed; plaintiff's motion for new trial overruled May 29, 1939.

Petition for writ of certiorari *denied* by the Supreme Court November 22, 1939.

On December 18, 1939, the Supreme Court granted a motion to extend the time for filing petition for rehearing and the time was extended to and including March 15, 1940.

JOSEPH DUGAN v. THE UNITED STATES

[No. L-91]

Patent case. Petition dismissed, judgment in favor of the United States, February 13, 1939. Plaintiff's motion for new trial overruled May 29, 1939.

Petition for writ of certiorari *denied* by the Supreme Court December 4, 1939. Rehearing *denied* January 8, 1940. 308 U. S. 614.

INDEX DIGEST

I. Where plaintiff entered into certain contracts with the Federal Surplus Relief Corporation, a Delaware corporation created under authority granted to the President by the provisions of the National Industrial Recovery Act, and continued by subsequent congressional enactments, it is held that the corporation is an agency of the Government. *John Morrell & Co.*, 167.

II. Where the contract itself did not disclose the fact that the United States was the principal, and the corporation was merely the agent, this is held to be immaterial. *Id.*

III. The statutes and the purpose for which the corporation was organized disclosed the agency. *Id.*

IV. When an agent, being duly authorized, acts on behalf of an undisclosed principal, the right of the other party to a contract to enforce the contract against the undisclosed principal is well settled. *Id.*

FOOD CONTROL ACT.

I. The actions and orders of the Enforcement Division of the Food Administration in requiring the plaintiffs to sell immediately cheese held in storage for curing, it is held were beyond the provisions and intent of the Food Control Act. *Mansfield*, 12.

II. The regulatory provisions of section 6 of the Food Control Act were intended to be applied reasonably, and in accordance with trade practices. *Id.*

III. Seizure, forced sale or criminal prosecution was not authorized in the absence of facts to establish a wilful hoarding of food products. *Id.*

IMMIGRATION ACT.

I. Where a British ship, *Chinese Prince*, upon entering Boston harbor, was found to have on board 20 members of the Chinese crew who were designated by an immigration inspector as *mala fide* seamen, and where an order issued by the immigration inspector for the detention on board ship of the said 20 alien seamen was accepted on behalf of the master of the ship by the purser, but said order was not served on the owner of the vessel, nor its agents, it is held that the fine imposed upon the agents, and paid by them, for the escape of 15 of the said alien seamen, was illegally imposed. *Rio Cape Line*, 307.

II. Notice served only on the master of a vessel does not impute any duty to the agent or to the owner. *Compagnie Generale Transatlantique* v. *Elting*, 298 U. S. 217, and cases therein referred to, cited. *Id.*

III. Voluntary payment of fines, if unlawfully collected, will not prevent recovery. *Id.*

PATENTS.

I. It is held that the evidence shows that the plaintiff's patent is invalid for lack of invention for the reason that every element of the single claim of the patent has been met by disclosures in prior patents. *Rulong*, 141.

II. It is held that the evidence establishes that the Certificates of Identification and the Continuous Discharge Book used by defendant and alleged to constitute an infringement of the Rulong patent do not respond to claim 1 of the patent in suit. *Id.*

III. The claim must be limited to the device or structure specified in the claim; the patent statute requires a patentee to specify and point out the parts which he claims to be new. *White* v. *Dunbar*, 119 U. S. 47, 52, cited. *Id.*

IV. Where the prior art patents offered and received in evidence show when they were filed and granted, and they were so offered and received in evidence under a stipulation that certification thereof was waived, it is held that the Letters Patent Certificate of the Commissioner of Patents and the seal of the Patent Office were not necessary to make them competent as evidence. *Id.*

PAY AND ALLOWANCES.

I. The Act of July 31, 1935, providing for promotion and retirement, applies only to commissioned officers; if Congress had intended to include "warrant officers" within the general term "officers of the Army" it would have done so. Pertinent cases cited and applied or differentiated. *Walton*, 28.

II. "Warrant officers" may not be generally classified with either commissioned officers or enlisted men; it is a distinct classification, ranking after commissioned officers but before enlisted men. *Id.*

III. Where Captain in the U. S. Marine Corps, without dependents, stationed in China, not on field duty, was furnished with only one room, and was put to extra expense for heat and bath, it is held that he is entitled

TAXES.

I. Where decedent directed that his residuary estate should "be divided and distributed and given to such charities and worthy objects" as his executor and his sister should determine, it is held that when the will is interpreted in the light of the testator's intentions, as expressed in the will and as gathered from surrounding facts and circumstances, the intention of the testator that his residuary estate should go to charity is adequately expressed in language sufficiently clear to comply with the provisions of Section 403 (a) (3) of the Revenue Act of 1921. *Beggs*, 39.

II. Where decedent, in his will, used the words "worthy objects" and "special friends," it is held that these words were used by decedent in connection with and in the same sense in which he directed that the net proceeds of his estate be divided and given to charities. *Id.*

III. The provisions of the taxing statutes exempting from tax gifts and bequests to charity are begotten from motives of public policy and are not to be narrowly construed. *Id.*

IV. A gift for a charitable use, which is sufficiently definite and certain as to purpose, is not void for uncertainty as to beneficiaries, where the power to select the beneficiaries is given expressly or impliedly to the trustee or to other persons. *Id.*

V. Where the estate went to charity under the authority of and pursuant to the terms of the will and not as a result of the absolute discretion of the executor, the value thereof was deductible from the gross estate. *Id.*

VI. Where the net income derived by the executor during administration became a part of the corpus of the residuary estate, the net proceeds of which were by the will bequeathed to charity and so distributed; and

TAXES—Continued.

year within the time allowed by statute and the regulations for making its capital stock tax return for such year. *Id.*

XLI. The statute was not dealing specifically with returns as such but with value and taxable years. *Id.*

XLII. Where life insurance policies were issued to decedent on his own life between March 10, 1925, and January 2, 1929, and where on July 20, 1932, the decedent, by an instrument in writing, transferred the life ownership of the said policies to his wife and upon her death to his son; it is held that, since said policies were issued when the estate tax provisions of the revenue statute specifically provided that the proceeds of such life policies should be included in the gross estate for the purpose of determining the net estate subject to tax, and decedent continued after assignment to pay the premiums, the proceeds of such policies in excess of $40,000 were properly included in the gross estate. *Bailey*, 364.

XLIII. The decedent, by assignment, divested himself of control over the policies, and the proceeds thereof, and the possibility of reverter to him in the event he survived the beneficiaries did not amount to a retention of such a beneficial interest therein as would, on that account, require the inclusion of the proceeds in the gross estate. *Id.*

XLIV. In section 302 (g) and (h) of the Revenue Acts of 1924 and 1926 and subsequent Acts, Congress has clearly expressed an intention to include in the taxable estate the proceeds of life insurance policies thereafter taken out by the insured upon his own life, notwithstanding an assignment by him of the right to receive the cash surrender value or to change the beneficiary. *Id.*

XLV. Congress possessed the constitutional right to do so. *Id.*

XLVI. Whatever may be the rights of the beneficiaries under assignments, there is not a complete transfer of the net proceeds of the policy nor an absolute right to the possession and enjoyment thereof during the lifetime of the insured. *Id.*

XLVII. Where beneficiary, who became the life owner of the policies upon the assignment of policies to said beneficiary, paid all premiums subsequent to the date of such assignment, it is held that the proceeds of such policies, in excess of the exemption of $40,000, could not, under the provisions of Section 302 of the Revenue

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THE COURT OF CLAIMS
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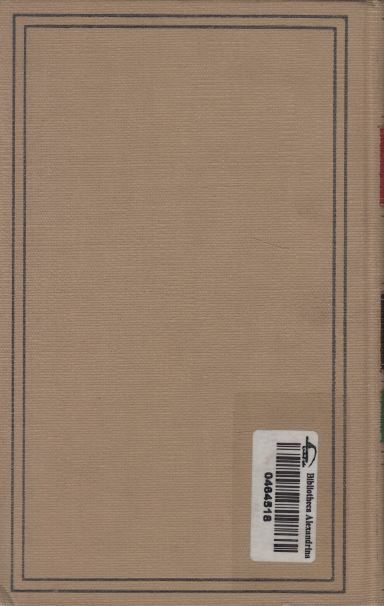
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(NOTE.—Other indexes were printed in volume 54 and volume 62. This index is a consolidation of the previous two indexes, with corrections, and the addition of subsequent cases, up to and including decisions delivered December 3, 1939.)

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